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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD AND
STATE OF WASHINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency and its Administrator, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-29a) is reported at 511 F.2d 963.[1]

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[1] Under the Federal Water Pollution Control Act original jurisdiction is in the court of appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(D).

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 35a-36a) was entered on February 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act, as amended in 1972, requires federal facilities that discharge water pollutants to obtain state water pollution control permits to continue operating; or whether it is sufficient for the federal facilities to comply with state substantive water pollution control requirements.

STATUTES AND REGULATION INVOLVED

Section 313 of the Federal Water Pollution Control Act, as added, 86 Stat. 875, 33 U.S.C. (Supp. II) 1323, provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such

> a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

Sections 505, 509(b), and 510 of the Federal Water Pollution Control Act, as added, 86 Stat. 888, 892, and 893, 33 U.S.C. (Supp. II) 1365, 1369(b), and 1370, in pertinent part, are reprinted in Appendix B, *infra*, pp. 30a-34a.

Section 125.2(b) of Title 40, C.F.R., provides as follows:

> The regulations in this part do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator pursuant to section 402(b) of the Act. Such State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States.

STATEMENT

When the States of California and Washington submitted their water pollution abatement programs to the Environmental Protection Agency (EPA), the EPA Administrator approved the States' programs, thus shifting authority to issue a permit from the EPA to the States, except as to federal facilities, which are excepted from state permit programs by 40 C.F.R. 125.2(b). The States thereafter filed petitions for review in the court of appeals, challenging the Administrator's action insofar as it withheld from the States the authority to require permits for federal facilities. California and Washington contended that Section 313 of the Federal Water Pollution Control Act ("the Act"), 33 U.S.C. (Supp. II) 1323, subjected federal facilities to the administrative procedures of state permit programs.

The court of appeals held that "the 1972 amendments to the Federal Water Pollution Control Act clearly mandate a federal agency duty of full compliance with all aspects of state permit programs" (App. A, *infra*, p. 28a). Therefore, the court declared invalid 40 C.F.R. 125.2(b), insofar as that provision exempted federal facilities from State permit procedures, and directed the Administrator to reconsider the disapproved portions of the permit programs submitted by California and Washington and to act expeditiously in a manner consistent with its opinion (App. A, *infra*, p. 29a). In so holding, the court noted that the language of Section 313, which is

central to these cases, is virtually identical to the language of Section 118 of the Clean Air Act, as amended, 42 U.S.C. 1857f (App. A, *infra*, pp. 23a-24a), and explicitly recognized that the Fifth and Sixth Circuits had arrived at conflicting interpretations of Section 118 of the Clean Air Act (App. A, *infra*, p. 24a).[2]

REASONS FOR GRANTING THE WRIT

The decision below, holding that federal facilities are subject to state water pollution permit requirements, is contrary to the decision of the Sixth Circuit in *Kentucky* v. *Ruckelshaus*, 497 F. 2d 1172 (certiorari granted *sub nom. Kentucky* v. *Train*, March 17, 1975, No. 74-220), which concerned the same issue in the context of air pollution. As the court of appeals here noted, the language of the federal facilities provision in the Federal Water Pollution Control Act, 33 U.S.C. (Supp. II) 1323, is nearly the same as that in the Clean Air Act, 42 U.S.C. 1857f. Moreover, the statutory scheme is basically the same in both Acts. In each, the state is to submit to the EPA a plan for the abatement of pollution. If the EPA approves the state plan, the authority for administration and enforcement is, in general, delegated to the state. Hence, the language of the two

[2] *Alabama* v. *Seeber*, 502 F.2d 1238 (C.A. 5), petition for certiorari pending, No. 74-851 (holding that federal facilities are subject to state permit procedures); *Kentucky* v. *Ruckelshaus*, 497 F.2d 1172 (C.A. 6), certiorari granted *sub nom Kentucky* v. *Train*, March 17, 1975, No. 74-220 (holding that federal facilities are not subject to state permit procedures).

federal facilities provisions, which is substantially identical, should be interpreted in a manner consistent with each other.

At various levels of litigation there are now a substantial number of cases involving federal facilities and Section 313 of the Federal Water Pollution Control Act or Section 118 of the Clean Air Act.[3] These cases present important questions concerning federal-state relationships with respect to environmental matters.

The issue in regard to the Water Act, as in regard to the Clean Air Act, is not whether pollution should be abated. The federal government agrees that as to non-exempt facilities it must meet all substantive water pollution standards set by the state. Rather, the question is the degree of state control authorized by Congress over federal facilities, particularly military installations. The applicability of state water

[3] In addition to this case and the *Seeber* and *Kentucky* cases there are *Illinois* v. *Department of Defense*, N.D. Ill., Civ. No. 74-C-3122 (Joliet Army Ammunition Plant, air pollution); *Illinois* v. *Department of Defense*, N.D. Ill., Civ. No. 74-C-1147 (Fort Sheridan, water pollution); *Illinois* v. *Rosing*, N.D. Ill., Civ. No. 74-C-1618 (Joliet Army Ammunition Plant, water pollution); *Fowinkle* v. *United States*, E.D. Tenn., Civ. No. 6837 (Volunteer Army Ammunition Plant, air pollution); *United States* v. *Pennsylvania Environmental Hearing Board*, M.D. Pa., Civ. No. 73-454 (Scranton Army Ammunition Plant, water pollution); *California* v. *Stastny*, 382 F. Supp. 222 (C.D. Cal.), appeal pending, C.A. 9, No. 72-2905 (Longbeach Naval base, air pollution); *County of Milwaukee* v. *Veterans Administration Center*, 357 F. Supp. 192 (E.D. Wisc.), motion for reconsideration pending (Veterans Administration building, air pollution).

pollution permit programs to federal facilities could result in the transfer to state governments of significant control over federal facilities. We submit that, as in the Clean Air Act cases, there is an insufficient basis in the Federal Water Pollution Control Act for imputing to Congress an intent to bring about so far-reaching a change in the distribution of governmental power within the federal system.

The Fifth and Sixth Circuits have given conflicting constructions to Section 118 of the Clean Air Act (see note 2, *supra*). This Court has granted the petition for a writ of certiorari in the Sixth Circuit case (*Kentucky* v. *Train*), and a petition for certiorari is pending in the Fifth Circuit case (*Seeber* v. *Alabama*). Therefore, in order to assure a consistent treatment of like statutory provisions, the instant case should be considered by this Court when it considers the Clean Air Act case.[4] If, as we contend in

[4] The court of appeals sought to avoid the conflict between the Fifth and Sixth Circuits over Section 118 of the Clean Air Act by suggesting a distinction between the Water Act and the Clean Air Act based in part on Sections 505(f)(6) and 510 of the Water Act, which concern state enforcement powers (App. A, *infra*, pp. 21a-23a). The court's focus upon those provisions suggests an absence of corresponding sections of the Clean Air Act. But the Clean Air Act has similar provisions. See Section 304(f) of the Clean Air Act, 42 U.S.C. 1857h-2(f), corresponding to Section 505(f)(6), 33 U.S.C. (Supp. II) 1365(f)(6), of the Water Act; and Section 116 of the Clean Air Act, 42 U.S.C. 1857d-1, corresponding to Section 510, 33 U.S.C. (Supp. II) 1370, of the Water Act.

That Section 313 of the Water Act requires federal facilities to pay "reasonable service charges," while the Clean Air Act contains no such provision, is not a basis for distinguish-

these cases, federal facilities are not subject to state permit programs regarding air pollution there is no apparent reason why they nevertheless should be subject to such state programs regarding water pollution.

Within the states included in the Ninth Circuit there are more than 1,800 major and medium federal installations that may be affected by the decision below.[5] Thus, in the Ninth Circuit itself this case has important consequences and since the same issue is pending consideration in the context of the Clean Air Act, a definitive resolution by this Court of the question presented here is warranted.

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ing the two statutes (App. A, *infra*, pp. 15a-17a). States have sewerage systems for handling water pollutants but no comparable services are provided for air pollutants and Congress decided only that federal facilities should pay *reasonable* charges to the states for use of their sewerage systems.

[5] More than 1,000 are located within the States of Washington and California. "Major" facilities have one million-plus square feet of floor area and "medium" facilities have 1,500 to one million square feet, without regard to acreage. (Figures supplied by the Environmental Protection Agency based on G.S.A. real property inventory of June 30, 1970.)

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

vs.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

Nos. 73-2486
74-1189

STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY, PETITIONER

vs.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

OPINION

[February 13, 1975]

On Petition to Review a Decision of the Administrator of the Environmental Protection Agency

Before: WRIGHT and CHOY, Circuit Judges, and BURNS, District Judge.*

WRIGHT, Circuit Judge:

Are federal agencies and enclaves within California and Washington required to comply with state procedural requirements with respect to control of water pollution? We hold that they are and we direct the respondent administrator to proceed accordingly and to reconsider the application of the state agencies of Washington and California.

Section 313 of the 1972 Amendments to the Federal Water Pollution Control Act [hereinafter "the Act," 33 U.S.C. §§ 1251-1376 (Supp. II, 1972)] directs that federal agencies "shall comply with . . . State . . . requirements respecting control and abatement of pollution." But the issue before us is whether federal agencies should submit to the procedural requirements for securing discharge permits which state regulatory bodies may impose on local discharges under section 402 of the statute, which is also sometimes referred to as the Clean Water Act.

Section 402 of the Act [33 U.S.C. § 1342] established the National Pollutant Discharge Elimination System [hereinafter NPDES]. Thereunder, the Administrator of the Environmental Protection Agency [hereinafter "the Administrator"] is delegated the initial responsibility for issuing permits for dis-

* Of the District of Oregon.

charges of pollutants into the navigable waters[1] of the United States.

The Act contemplates, however, that the states will assume primary responsibility for operation of the

[1] Congress has used the phrase "navigable waters of the United States" in several different senses, ranging from the narrowest and most literal interpretation of that phrase ("navigable in fact") to the most expansive one permitted by the constitutional grant, *U.S. Const.* Art. I, sec. 8, cl. 3. *Compare, e.g., The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870) *with Kalur* v. *Resor,* 335 F. Supp. 1, 11 (1971). *Cf. also Gibbons* v. *Odgen,* 22 U.S. (9 Wheat.) 1 (1824). Section 502(7) of the Act [33 U.S.C. § 1362(7)] speaks of the term "navigable waters" as encompassing "the waters of the United States, including the territorial seas." S. Conf. Rep. No. 92-1236, 1972 *U.S. Code Cong. & Admin. News* 3821. Thus Congress clearly meant to extend the Act's jurisdiction to the constitutional limit, to include all tributaries of rivers which, "when combined with other waters or systems of transportation, . . . the commerce on such waters would have a substantial economic effect on interstate commerce." Report of the Conference Committee on S. 2770, reported in *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 166, 178 (Comm. on Publ. Works Print, 1973) [hereinafter cited as *Legislative History*].

The Act thus contemplates regulation of any activity within the class of streams noted above or the class of pollution discharges into such streams, without regard to whether either the particular discharge or the individual receiving waters discernibly affect interstate commerce. *See United States* v. *Ashland Oil & Transportation Co.,* 364 F. Supp. 349 (W.D. Ky. 1973); *United States* v. *Holland,* 6 E.R.C. 1388 (M.D. Fla. 1974). The legislative history expressly discloses an intention to avoid the limitations on implementation of the 1965 Act which had been occasioned by a narrow interpretation of the phrase "navigable waters" as used in that Act. S. Rep. No. 92-414, 1972 *U.S. Code Cong. & Admin. News* 3742.

NPDES permit system. Section 402(b) of the Act [33 U.S.C. § 1342(b)] provides for approval by the Administrator of state-submitted permit programs which are adequate to ensure compliance with the federal standards set out in the Act. After approving a state program, the Administrator is required to suspend his issuance of discharge permits "as to those navigable waters subject to [that state's] program." Section 402(c)(1) of the Act [33 U.S.C. § 1342(c)(1)].

Petitioners (California and Washington) challenged the Administrator's limited approval of their proposed permit programs in original actions authorized by Section 509(b)(1)(D) of the Act [33 U.S.C. § 1369(b)(1)(D)]. Both states claim error because the Administrator's approval exempted federal agencies and instrumentalities from compliance with their proposed permit programs. We ordered the cases consolidated for purposes of the government's briefing and oral argument.

We have determined that the interpretation advanced by petitioners, that the Act provides for state regulation of federal as well as state dischargers, is correct. Hence we declare invalid those portions of 40 C.F.R. 125.2(b) that exclude federal facilities discharging pollutants into navigable waters from compliance with any state permit program operating under NPDES. We direct the Environmental Protection Agency and its Administrator to include henceforth in any otherwise approvable permit program submitted to it by the governors of the States of

Washington or California, the authority to issue permits for all discharges by federal facilities within their respective jurisdictions.

A. *THE STATUTE.*

Modern federal legislation in the area of water pollution control began in 1948 with the enactment of the initial version of the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155. The Act was amended in 1956, 1965, 1966, and 1970 as well as 1972, each set of amendments seeking to establish a more comprehensive and effective national system for encouraging and coordinating regulation of waste discharges into the nation's waters.

At the same time, all successive versions of the Federal Water Pollution Control Act have reflected a consistent federal policy that the primary responsibility and right to control water pollution lies with the states. *See generally* S. Rep. No. 92-414, 1972 *U.S. Code Cong. & Admin. News* 3668, 3669-70. As a corollary, the federal role has primarily been viewed as one of supporting and assisting state efforts in this area. *See id.*

Section 21(a) of the 1970 amendments to the Act (collectively dubbed the Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91) applied this policy of primary state responsibility for water pollution control to federal agency dischargers. It required federal agencies having jurisdiction over properties, or engaged in public work activities, to comply with "applicable water quality standards" as

well as with the more general pollution abating purposes behind the legislation.

In reporting favorably what became the House version of the 1970 amendments, the House Committee on Public Works noted that Section 21(a) would require federal agencies to take "immediate and appropriate steps to insure compliance with applicable Federal, State and local water quality standards . . . subject to the availability of appropriations and the needs of the United States." H.R. Rep. No. 91-127, 1970 *U.S. Code Cong. & Admin. News* 2691, 2736-37.

The final bill which emerged from conference removed any discretion based on availability of appropriations, and thus required compliance by federal agencies subject only to "the paramount interest of the United States as determined by the President." *Id.* at 2740. The interpretation of Section 21(a) suggested by this legislative history (that federal agencies must comply with local pollution abatement standards and guidelines "unless and until the President may determine otherwise") was judically approved in *California* v. *Davidson*, 3 E.R.C. 1157, 1158 (N.D. Cal. 1971) (refusing to dismiss an action by the State of California against the Army's commanding general at Fort Ord, seeking injunctive relief and damages for the installation's violation of the state's waste discharge limitations).

Section 21(a) was replaced in 1972 by Section 313 of the 1972 Amendments, 33 U.S.C. § 1323,

which set out the compliance requirement for federal agencies in the following language:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

The legislative history behind Section 313 shows that Congress considered that section "similar to one in existing law." S. Rep. No. 92-414, 1972 *U.S. Code Cong. & Admin. News* 3733. Several supplementary affidavits submitted by petitioner State of California indicate that some federal installations

may in fact be refusing in certain instances to comply with water quality standards established by state administrative boards.[2] However, respondents are willing to concede, at least in principle, that Section 313 does command deference to the substantive effluent limitations and standards promulgated by states pursuant to the Act.

In determining whether Section 313 commands a like federal deference to procedures for obtaining state NPDES permits, *California* v. *Davidson, supra,* may again be of some guidance. In that case District Judge Weigel held that California's assertion that the Army had refused to bring one of its facilities into compliance with "requirements" promul-

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[2] An affidavit of Bill Dendy, Executive Officer of the California State Water Resources Control Board, is attached to the reply brief of petitioner California. It details two recent occasions where the Administrator has issued permits for the discharge of pollutants by federal agencies (Norton Air Force Base and the U.S. Bureau of Reclamation) without including conditions in the permit as requested by the interested state regulator agencies. Instead, the Administrator is continuing to screen such state-requested permit conditions, and apply his own notions of "best practicable" and "best available" technology and of what constitutes compliance "to the fullest extent possible" in issuing permits to federal agencies, rather than the standards suggested by the state. Cf. Sections 301(b)(1) and (b)(2) of the Act, 33 U.S.C. §§ 1311(b)(1) & (b)(2). *See also* note 12, *infra*; S. Rep. No. 92-414, *supra* note 1 at 3733:

> "Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort."

gated by a California regional water quality control board stated a good cause of action for injunctive relief under Section 21(a) of the 1970 amendments to the Act [the former 33 U.S.C. § 1171(a) (1970)]. Since the regional boards determine "substantive" requirements applicable to specific waste discharges via administrative hearings which are ordinarily participated in by the discharger,[3] the inference might be drawn that Section 21(a) required compliance with state administrative procedures as well.

Any such inference that federal agencies must comply with "procedural" as well as substantive state discharge permit requirements could only be strengthened by the language of the section of the 1972 amendments which replaced Section 21(a), considered in *Davidson.* Section 21(a) had required only that federal agencies comply with "applicable water quality standards," without specifying whether compliance was limited to the substantive content of the "stand-

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[3] The Porter-Cologne Act, *Cal. Water Code* §§ 13020 *et seq.*, enacted by the California legislature in 1969, authorizes California's regional water quality control boards to issue standards, or "requirements," applicable to waste discharges which might affect the state's waters. *Id.* § 13263. The regional boards conduct administrative proceedings, which are participated in by the applicant, and issue "requirements" applicable to the specific discharge.

Both the regional boards and the State Water Resources Control Board, which must issue water appropriation permits, are required to comply with the provisions of the California Environmental Quality Act, *Cal. Publ. Resources Code* §§ 21000 *et seq.* The State Board is also statutorily required to consider "the public interest." *Cal. Water Code* §§ 1253, 1255, 1257.

ards" referred to, and without specifying whether those standards included state standards. Section 313 changed the word "standards" to "requirements," and expressly made reference to "State" and "local" requirements.

B. *CONDITIONS REQUIRED FOR A STATUTORY WAIVER OF EXCLUSIVE FEDERAL LEGISLATIVE JURISDICTION.*

Standing by itself, however, this reasoning would be insufficient to allow us to conclude that the Act requires federal agencies to comply with procedures for obtaining permits under state programs satisfying the criteria of Section 402(b). Our ability to reach such a determination is limited by the plenary powers clause (*U.S. Const.* Art. I, sec. 8, cl. 17), which gives Congress exclusive legislative authority over federal enclaves. It is further limited by the supremacy clause (U.S. Const. Art. VI, cl. 2), according to which federal law cannot be subordinated to state regulation within the areas of Congress' exclusive legislative powers.

It is, of course, well established that Congress may waive exclusive legislative jurisdiction over the activities of federal enclaves in deference to state regulation of those activities, at least so long as in doing so it does not undermine its ultimate legislative control over these areas. *Paul* v. *United States*, 371 U.S. 245, 263 (1963); *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *See also Mayo* v. *United States*,

319 U.S. 441 (1943); *Maun* v. *United States*, 347 F.2d 970 (9th Cir. 1965).

But waivers of exclusive federal jurisdiction, like waivers of sovereign immunity, are to be strictly construed. *Cf. Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In order for us to hold in favor of petitioners, therefore, we must find that the claimed waiver of exclusive federal jurisdiction is clear and unambiguous, and also that it is not unduly broad or irrevocable.

C. *THE SCOPE OF THE CLAIMED WAIVER*

Respondents point to the language of the plenary powers clause itself in arguing that Congress cannot delegate to states the authority to regulate federal facilities. On this point, however, we find persuasive the language in a recent case, *Illinois* v. *Department of Defense*, Civil No. 73 C 2081 (N.D. Ill., July 18, 1974) (unpublished memorandum filed with court by respondents):

> The Plenary Powers Clause grants Congress the power "[t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dockyards and other needful Buildings." The defendants argue that the term "exclusive" means literally that the State cannot be permitted to exercise any power in regard to these enclaves. In support thereof they cite three dictionary definitions of the meaning of

> the word, "exclusive," which is inappropriate. This reliance is ill founded, for while literal meanings may be helpful, they hardly measure the breadth or historical significance of the clauses of the Constitution.

Id., at 5.

A delegation to the states of permit-issuing authority over federal agencies would, to be sure, involve the states to a far greater extent in the regulatory process than would an incorporation of their evolving substantive standards into federal law (the type of legislation upheld in *United States* v. *Sharpnack, supra*). However, *Paul, supra*, at 263 clearly indicates that states may engage in actual regulatory activities if allowed by specific Congressional action. This would seem a natural extension of the power of Congress to delegate substantive lawmaking authority as in *Sharpnack*. As the Supreme Court noted in *Carlson* v. *Landon*, 342 U.S. 524, 542 (1952), "Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose."

The Congressional purpose behind the Water Pollution Control Act is clear: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [33 U.S.C. § 1251(a).] The strong state interest in controlling pollution has been recognized by the Supreme Court, *see Illinois* v. *City of Milwaukee*, 406 U.S. 91, 104, 107 (1972), as well as in the Act itself, *see Section* 101(b) of the Act [33 U.S.C. § 1251(b)].

Thus any delegation of permit-issuing responsibilities under the Act would merely involve "the selection of an alternative means for achieving the purposes of the Act." *Illinois* v. *Department of Defense, supra*, at 7. Since Congress has the power to subject federal agencies to substantive state standards, *see United States* v. *Sharpnack, supra*, we can see no reason why Congress cannot utilize state regulatory bodies to certify whether the affected agencies are in compliance with those standards.[4]

Several limitations embodied in the Act itself demonstrate Congress' efforts to ensure that the Act's grant of permit-issuing authority to the states, under Section 402(b), could in no way undermine the federal government's ultimate power over its own instrumentalities and over interstate commerce by the constitutional grant of authority over these areas to Congress. First, the Act in no way seeks to limit Congress' ability to reassert exclusive control over the affected federal areas. Nor does it seem that in practice Congress would be politically compelled to retain the Act in its present form, if states attempted significant incursions into the federal prerogative.

Secondly, Section 402(b) allows the Administrator to withhold or withdraw approval of state programs which do not meet clearly defined guidelines set out in Section 402(a) of the Act.[5] Finally, as noted

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[4] *Cf. Alabama* v. *Seeber*, 502 F.2d 1238, 1248 (5th Cir. 1974).

[5] However, the Administrator's role following approval of a state permit program is a very limited one. Sections 402

previously, Section 313 allows the President to exempt any effluent source from the provisions of the Act, where for any reason (other than a lack of appropriated funds) he deems it in the paramount national interest that a source not be covered. Section 313 of the Act [33 U.S.C. § 1323].

D. *THE CLARITY OF THE WAIVER.*

Having determined that Congress had the power to compel agencies within its "exclusive" legislative jurisdiction to seek state discharge permits, we now consider whether it acted in a sufficiently unequivocal manner for us to conclude that it clearly intended to do so. *See, e.g., United States* v. *King*, 395 U.S. 1, 4 (1969). We find the language of waiver sufficiently clear and free from ambiguity.

Both sides point to the Act's legislative history as supportive of their respective positions. However, it is admitted that that part of the record pertaining to Section 313 is silent as to the meaning of that section's "shall comply with . . . State . . . requirements" admonition.

Nor do we find any other legislative history surrounding the Act which conclusively establishes whether Congress did or did not intend to distinguish between substantive and procedural requirements in

(d) (2) (A) and (B) of the Act [33 U.S.C. §§ 1342(d) (2) (A) and (B)] allow the Administrator to prevent issuance of a state permit only if the proposed discharge would adversely affect a downstream state, or if the permit is inconsistent with the Administrator's guidelines under § 402(a).

defining the federal agency compliance duty with state permit programs. "Confronted with this ambiguity, we rely on the words of [Section 313], the scheme of the Act as a whole, and what we discern to be the Congressional purpose, as the best guides to interpreting the section." *Alabama* v. *Seeber*, 502 F.2d 1238, 1247 (5th Cir. 1974) (discussed *infra*).

If taken in isolation, certain parts of the legislative history would seem to indicate that the "requirements" language of Section 313 refers simply and solely to substantive water quality standards. For example, the committee report accompanying the House version of the Act stated:

> This section [Section 313] requires that Federal facilities meet the same effluent limitations, other limitations, performance standards, toxic effluent standards and thermal discharge regulations as private sources of pollution, unless the Federal facility is specifically exempted by the President.[6]

However, the last clause in the sentence containing the disputed "requirements" language would seem to indicate that the above legislative history of Section 313 should be viewed as a mere summary of the Act's major provisions, and not taken as dispositive of

[6] H. Rep. No. 92-911, *Legislative History* at 805. Similar language was found in the Senate committee reports accompanying S. 2770, eventually passed in lieu of the House bill. *See* S. Rep. No. 92-414, *supra* note 1, at 3733-34; S. Conf. Rep. No. 92-1236, *supra* note 1, at 3812-13.

Congressional intent.[7] That clause requires federal agencies to comply with state requirements respecting pollution control and abatement just as any other discharger, "including the payment of reasonable service charges."

Respondents contend that these "reasonable service charges" refer to those for state and local sewage treatment hookups. We disagree. Although the legislative history of Section 313 is silent regarding the meaning of the "reasonable service charges" language, it seems the better interpretation is to read it as referring to charges incident to state permit programs. Even if we were to read the word "requirements" in Section 313 to mean "effluent standards and limitations," as respondents contend we should, interpreting the "reasonable service charge" language to refer to municipal waste disposal charges would create a *non sequitur*.

Moreover, interpreting "reasonable service charges" to refer to charges associated with state permit programs would be in accord with the canon of statutory construction that, where language in a statute can be given two possible interpretations, that interpretation should be chosen which does not render the language meaningless.[8] Although a state's taxing power cannot operate within the confines of a federal enclave without the consent of the United States,

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[7] *Accord*, Comment, *Local Control of Pollution from Federal Facilities*, 11 San Diego L. Rev. 972, 991 (1974).

[8] *See J. Sutherland, Stats. and Statutory Construction* § 46.06 (4th ed. C. Stands 1972).

Mississippi River Fuel Corp. v. *Mouton*, 390 F.2d 34, 35 (5th Cir. 1968), no serious contention has ever been made that subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of municipal sewer system costs. On the other hand, any permit program charges might be sufficiently in the nature of a tax that specific federal consent would be required before they could be certified as "properly payable" federal obligations.

Reading "reasonable service charges" to mean charges for administering state permit programs finds some support in past state administrative practices as well. Among the federal applicants for waste discharge "requirements" from California's regional water quality control boards,[9] several have paid the filing fees required by state law.[10] (The State of Washington assesses no fee for processing discharge permit applications under the Act.) Congress may have been aware of this sporadic record of compliance, and have sought to ensure that in the future federal agencies would uniformly contribute their full share to the cost of processing their applications under state permit programs.

Section 313 also requires federal agencies to comply with state pollution control requirements "to the

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[9] *See* note 3, *supra*.

[10] *See* affidavit of Bill Dendy, cited in note 2, *supra*.

same extent that any person is subject to such requirements." Hence, the extent of the federal agency compliance duty can only be gauged from the type of program that section 402 of the Act demands that states institute for private dischargers.

Sections 402(a)(1) and 402(a)(2) of the Act [33 U.S.C. §§ 1342(a)(1) and (2)] sketch the type of state permit scheme contemplated by Congress. They provide for the imposition of "conditions" on permits. Such conditions can realistically be expected to be developed only in the type of administrative proceeding in which the permit requirements can be tailored to the specific discharger.[11] Since this type of administrative proceeding requires cooperation by the discharger in order to be effective, an interpretation of Section 313, which did not compel federal agencies to comply with the procedural requirements of state permit programs would also jeopardize their conceded duty to comply with the substance of state water pollution control efforts.[12]

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[11] In programs modeled after the California NPDES program, the first to be approved by the Administrator following the Act's passage, the process is initiated by the discharger submitting a report of an actual or contemplated discharge to an administrative board. Thereafter the board conducts a hearing concerning the discharge, and develops limitations, requirements, and conditions with which the discharger must comply as a condition of obtaining and retaining the permit. It is thus by the administrative process that discharges are brought to the state's attention, and applicable quantitative and qualitative standards developed.

[12] We disagree with the assumption in *Kentucky* v. *Ruckelsaus*, 497 F.2d 1172, 1177 (6th Cir. 1974), that a permit has nothing to do with air (or water) quality. *See* Comment, supra note 7, at 986.

In other words, without federal agency participation in the regular state administrative process, it would be difficult to determine what substantive standards were properly applicable. Consequently, unless they are forced to seek discharge permits like any other dischargers, federal agencies will not be complying with state requirements—substantive or procedural—"to the same extent as any person subject to such requirements," thus undermining the purpose of Section 313.

We have already noted, however, the Administrator's apparent concession that federal agencies are bound by "substantive" state requirements. It is therefore possible that his position is not that federal agencies may bypass state administrative processes, but only that after all effluent standards and limitations have been determined for a federal discharger, it is up to the Administrator and not the states to issue the permit incorporating these standards.[13]

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[13] This position would appear to be consistent with Executive Order No. 11752, 3 C.F.R. 380 (1974).

Respondents' reliance on it is misplaced. In the first place, even if we accept respondents' contention that this executive order constitutes an administrative interpretation of Section 313, *but see contra Alabama* v. *Seeber*, 502 F.2d at 1249, the normal rule attaching significance to the manner in which a statute is interpreted by the agency charged with its enforcement is inapplicable here. That rule is based on the assumption that Congress' long-standing failure to overturn the agency's interpretation indicates congressional acquiescence

This interpretation of Section 313's command should also be rejected. When we are faced with two alternative readings of an act, we should be reluctant to attribute to Congress a conscious choice in favor of the less efficient one,[14] at least when there is no constitutional compulsion to do so. This is especially

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in that interpretation. *See Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). In this case, the executive order was issued too recently for Congress to have undertaken contrary amendatory action.

Secondly, in finding support for its holding in Executive Order 11752, the court in *Kentucky* v. *Ruckelshaus* pointed out that the above-noted rule of statutory construction is of particular importance where supported by the legislative history of the act to which the order refers. 497 F.2d at 1176. Here, however, it is admitted that the legislative history is silent as to the question presented regarding the correct interpretation of Section 313.

Finally, the fact that Executive Order No. 11752 was issued more than four months after petitioner California brought this suit suggests that the order was issued in response to it. For this reason also it is entitled to less weight.

Nor can Executive Order No. 11752 be considered an exercise of the President's authority under Clean Air Act § 118 and § 313 of the Water Pollution Control Act to exempt facilities from certain requirements. "Exercise of that authority contemplates a case by case determination that the exemption is in the paramount interest of the United States." *Alabama* v. *Seeber*, 502 F.2d at 1249.

[14] Nowhere in the language of Section 402, establishing the NPDES, is there any suggestion that the Administrator may establish a dual permit system, administered in part by a state and in part by himself. The legislative history of Section 313 also is devoid of any indication that Congress intended to allow the Administrator to retain partial permit issuing authority.

the case, when we consider the admonition of Section 101(f) of the Act, 33 U.S.C. § 1251(f):

> It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

As with Section 402, Section 510 of the Water Pollution Control Act has no counterpart in the Clean Air language construed in *Kentucky* v. *Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974), and *California* v. *Stastny*, 4 E.R.C. 1447 (C.D. Cal. 1972), *appeal pending*, 9th Circuit No. 72-2905. Section 510 provides:

> State authority
>
> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of perform-

> ance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The above language undercuts respondents' theory that "effluent limitations" and "requirements" were meant to be considered interchangeable terms within the framework of the Water Pollution Control Act. It specifically distinguishes between a "standard" or "limitation" respecting discharges of pollutants, in subdivision (1)(A), and a "requirement respecting control or abatement of pollution" in (1)(B).

Moreover, Section 510 implicitly grants to states the right to develop more stringent standards than the Administrator might apply to a federal agency discharger. Thus, even if Section 313 were held to require federal agencies to seek permits from the Administrator rather than from the states, Section 510 would compel compliance with those state standards which were stricter than the Administrator's. But as noted above, Section 510 would in practice be rendered ineffectual by such an interpretation for state permit program compliance is essential both to establishment of discharge standards and to detection of discharge violations.

Considered in the light of Sections 402 and 510, other sections in the Act afford added support to petitioners' interpretation of the term "requirements"

in Section 313, though the significance of each would have been less certain apart from these two sections, For example, several provisions of the Act use the terms "effluent limitations" and "standards" in a very precise sense.[15] Other sections expressly exempt federal agencies from their requirements.[16] And one section, Section 1104 of the Act [33 U.S.C. § 1344], sets up a separate permit program, run by the Secretary of the Army rather than by the states, for discharges of dredged or fill material into navigable waters. Consequently, it would appear that the reference in Section 313 to federal agency compliance with state "requirements," was purposeful and artistic, and was meant to refer to those requirements which state administrative agencies might adopt under their express Section 402 authorizations.

This view is supported by Section 505(f) of the Act [33 U.S.C. § 1365(f)], which also shows that the Act's drafters meant to draw a distinction between the two terms. Section 505(f) explicitly distinguishes between an "effluent standard or limitation" and other types of "limitation" or "standard," on the one hand, and a "requirement applicable by reason of Section 313" on the other.

It is true that other courts are in disagreement as to what effect should be given language in the Clean Air Act of 1970 [42 U.S.C. §§ 1857-1857*l* (1970)],

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[15] *E.g.*, *see* Sections 301, 302, 303, 306, 307 and 315 of the Act [33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, 1325].

[16] *See* Sections 306(c), 308(c), 401(a)(6) of the Act [33 U.S.C. §§ 1316(c), 1318(c), 1341(a)(6)].

portions of which are substantially identical to the language of Section 313 and of several other sections of the 1972 Water Pollution Control Act Amendments. *Compare Alabama* v. *Seeber, supra, with Kentucky* v. *Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974), and *California* v. *Statny, supra.* At issue in those cases was whether Section 118 of the Clean Air Act [42 U.S.C. § 1857f], which lacks only the "reasonable service charges" language of Section 313, requires federal agencies to seek state permits for air pollutant emissions.

In *Seeber*, the majority relied on Section 118 to hold unjustified the refusal of TVA and Army officials to apply for such permits. This was contrary to the prior holdings in *California* v. *Statsny* and *Kentucky* v. *Ruckelshaus.* In the *Kentucky* case, a unanimous Sixth Circuit panel had refused to order various TVA and other federal officials to seek state permits before operating air polluting equipment. The *Kentucky* court found "no congressional intent" to subject federal instrumentalities and agencies to state adminitsartive regulations," and concluded that:

> In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.

Id. at 1176. In *Stastny*, the district court arrived at the same conclusion in a short memorandum decision.

We do not feel compelled to anticipate this court's ruling on the appeal in *Stastny* by adopting either the

Fifth or the Sixth Circuit's position. We recognize the strong structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments. Moreover, it seems likely that these similarities were intentional. Nevertheless, we feel that our conclusion—that Section 313 requires full federal agency compliance with state water pollutant discharge permit programs—would not be inconsistent with either an affirmance or a reversal of the district court's decision in *Stastny.*

As we have noted, the Water Pollution Control Act Amendments do contain significant provisions indicating a waiver of exclusive federal jurisdiction for which no counterparts are to be found in the Clean Air Act. The "reasonable service charges" clause of Section 313, the permit program of Section 402, and Section 510, containing the Act's "State Authority" provisions, are the most important examples of these.

Furthermore, although the language of Section 505 (f), discussed *supra*, closely parallels that of Section 304(f) of the Clean Air Act,[17] there is also here critical additional language which seems too overcome the EPA's contention that Congress intended to incorporate a substantive-procedural distinction into the Section 313 compliance requirement. Section 505 (f) [33 U.S.C. § 1365(f)] provides:

> "(f) For purposes of this section, the term 'effluent standard or limitation under this chapter' means (1) effective July 1, 1973 an unlawful act under subsection (a) of section 1311 of this

[17] 42 U.S.C. § 1857h-2(f).

> title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title)."

The linking of the Section 402 permit scheme with the Section 313 "requirements" language in Subsection 505(f)(6) clearly indicates that state permit programs give rise to a separate category of requirements, non-compliance with which will subject federal agencies (and others) to suit under Section 505(e), just as "substantive" noncompliance will. Consequently, the inclusion of Subsection 505(f)(6) in Section 505, the Act's primary enforcement section, dispels any ambiguity as to Congress' intention to require full compliance with the procedural requirements of state pollution control initiatives as well as with the substance of their programs.

This dual compliance requirement seems natural, when considered in light of Section 510, discussed *supra*, which sets out the broad powers allowed states under the Act to promulgate stricter regulations than those required by the federal government. Furthermore, as we have noted, the practical effect of reading Section 313 so as to compel only "substantive" federal agency compliance would be to render state

permit programs ineffectual as to those dischargers, both substantively and procedurally.

Finally, we find no bar to this action under the doctrine of sovereign immunity. Petitioner states proceeded in this action under Section 509(6)(1)(d). Since that section explicitly provides for challenges to the Administrator's "determinations" regarding state programs, there can be no doubt as to Congress' consent to suits of the type before us.

Respondents assert that petitioners' remedy, if any, lay under the "citizen suit" provisions of Section 505. We find this argument unpersuasive both as a matter of statutory construction and as a question of efficient judicial administration.

In the first place, we note that implicit in respondents' contention are the premises that petitioners are only concerned that federal agencies do in fact meet the substantive requirements of state permit programs, and that all the states are really seeking to accomplish in this case can be attained by case-by-case attacks on the occasional instances of substantive noncompliance. As we have already noted, however, the states have a significant interest in ensuring procedural as well as substantive compliance with their permit programs.

Moreover, assuming without deciding the additional premise of respondents that a state is technically a "person" entitled to sue under Section 505, a state might nevertheless prefer to seek an advance determination of the scope of federal agency compliance duties under Section 509. What is challenged

here is not a failure to perform any single "act" or "duty", as much as the Administrator's general misinterpretation of the scope of state regulatory jurisdiction under the Act. An action to spell out the scope of state authority granted by the Act seems to be the exact type of challenge that Congress must have contemplated in enacting Section 509. An interpretation that Congress intended that such a challenge be deferred until the states had first attacked individual violations of their programs would waste judicial resources as well as conflict with the Act's intent to let the states take the lead in attacking water pollution at the earliest possible ime.

E. *CONCLUSION.*

In conclusion, the 1972 amendments to the Federal Water Pollution Control Act clearly mandate a federal agency duty of full compliance with all aspects of state permit programs. We are aware that the Act retains some phraseology which courts, in interpreting the Clean Air Act, have found too inconclusive to support the clear waiver of federal legislative jurisdiction which is necessary to overcome the presumption of exclusive federal jurisdiction under the plenary powers clause. But the 1972 version of the Water Pollution Control Act introduces several important terminological and structural changes from the Clean Air Act language. It also differs significantly from the Clean Air Act in the comprehensiveness of the administrative scheme it ordains. These distinctions help manifest the congressional purpose

that states be in the vanguard of the national attack on water pollution,[18] as *California* v. *Davidson, supra,* found to have been the recurrent theme of federal water pollution control efforts. They also suggest a clear congressional choice to rely on state regulatory and enforcement agencies to carry out this effort.

Where a construction finding a waiver of exclusive federal jurisdiction would support the stated congressional purpose, then it seems to us that a purported waiver should be "construed, if not liberally, at least sensibly." *See* H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 1351 (2d ed. 1973). In this case, Congress left no question as to its intent that states should take the lead in water pollution control efforts, and that states should view the compliance schedules and standards in Section 402(a) as floors, not ceilings, for their own Section 402(b) programs. Thus we act in accordance with the clear intent of Congress as well as with the plain language of the statute in holding that federal dischargers within a state's jurisdiction must comply fully with state permit programs satisfying the Section 402 conditions for approval by the Administrator.

We direct the Administrator to reconsider the applications of the States of Washington and California to the extent that he previously withheld approval from such proposed programs, and to act expeditiously on those previously disapproved portions of the applications in a manner not inconsistent with the views expressed in this opinion.

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[18] *See* Section 101(b) of the Act [33 U.S.C. § 1251(b)]. *Cf. Alabama* v. *Seeber,* 502 F.2d at 1244-45.

APPENDIX B

Section 505 of the Federal Water Pollution Control Act ("the Act"), as added, 86 Stat. 888, 33 U.S.C. (Supp. II) 1365, provides in pertinent part:

* * * *

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

* * * * *

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

Section 509(b) of the Act, as added, 86 Stat. 892, 33 U.S.C. (Supp. II) 1369(b), provides:

> (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Section 510 of the Act, as added, 86 Stat. 893, 33 U.S.C. (Supp. II) 1370, provides:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the

right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement or pollution, except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

vs.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

Nos. 73-2486
74-1189

STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY, PETITIONER

vs.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

OPINION

[February 13, 1975]

JUDGMENT

On Petition For Review of A Decision
of the Environmental Protection Agency

This cause came on to be heard on the transcript of the record from the United States Environmental Protection Agency and was duly submitted.

ON CONSIDERATION WHEREOF it is now here ordered and adjudged by this Court that the order of the said Environmental Protection Agency in this cause be and it hereby is remanded and the respondent Administrator shall proceed accordingly to reconsider the applications of the state agencies of Washington and California.

[SEAL]

Clerk of the Court

By /s/ Susan White
Deputy

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 575896 162

Supreme Court, U. S.
FILED
AUG 7 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD AND
STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1975
CERTIORARI GRANTED JUNE 23, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD AND
STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1] Under the Federal Water Pollution Control Act original jurisdiction is in the Court of Appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(D). The Court of Appeals' opinion and judgment have been printed as Appendices A and C, respectively, to the Petition for a Writ of Certiorari.

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DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 73-2466, 73-2486, 74-1189 [2]

DATE	FILINGS—PROCEEDINGS

C.A. 9 Docket No. 73-2466:

8/6/73 Filed original and seven copies, Petition to Review an Order of the EPA approving a State permit system.

9/19/73 Filed original and two copies of Certified List of Record in Lieu of Record pursuant to Rule 17(b), FRAP

9/24/73 Received original and four copies of Petitioners request for portions of administrative record., -to- BR. -mo-

9/26/73 Filed Motion and Order (BR) granting petitioner's request for portions of administrative record. Subject to reconsideration in filing of opposition within time fixed by rule

10/9/73 Received portions of the administrative record. Returned for additional copies

10/23/73 Filed 26 Appellants Briefs

11/16/73 Filed four Certified Copies of portions of the Administrative Record (PP. 737 to 802).

1/16/74 Filed typewritten copy of respondent's brief

1/18/74 Filed 25 appellees briefs

3/22/74 Filed as of March 21, 1974, 25 Appellants Reply Briefs. (For State of California) Service 3/5/74

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[2] Those relevant docket entries which are common to more than one of the three docket cards here involved are not repeated below, but are included only under that case to which they relate most directly or under the first case (by docket number) in which they appear.

DATE	FILINGS—PROCEEDINGS

3/22/74 Filed original and seven copies of petitioner's (State of California) motion to augment record; to "C" (from "C" to O'Fallon as of 3/28/74)

5/23/74 Filed order (D & CY) petitioner's motion to augment the record is granted

6/20/74 Filed petitioner's motion to expedite hearing on appeal to (C)

7/15/74 Filed respondents' memorandum concerning motion for expedited hearing

8/15/74 Filed petitioner's People of State of California motion to augment record on petition for review to (panel)

8/22/74 Filed order (W) granting petitioner leave to augment the record

9/10/74 Argued & submitted to: Wright, Choy, CJJ, Burns, DJ

10/15/74 Filed order (Wright) we hereby request that the following items listed in the index to the administrative record in this cause be transmitted to us: Item No. 6, Page 15; Item 7, Page 16; Item 10, Page 265; & Item 23, Page 709

11/14/75 Received from Regional Counsel Dunn various documents requested by Judge Wright (in LPS)

2/13/75 Ordered Opinion (Wright) Filed & Judge to be filed & entered

2/13/75 Filed opinion—Remanded with direction

2/13/75 Filed & Entered Judgment

3/5/75 Filed original and three copies of Opposition to Application for Stay of Mandate to (Wright)

3/5/75 Filed respondent's application for stay pending determination of cert. to (Wright)

DATE	FILINGS—PROCEEDINGS

3/13/75 Recvd. oral directive from Judge Wright to call counsel & advise that app for stay is denied (order as yet not recvd or filed)

3/17/75 Filed order (W, Cy & Burns) denying the stay

3/20/75 Issued Judgment

5/22/75 Recvd. SC notice re: filing pet for cert 5/14/75 SC#74-1435

6/24/75 Filed certified copy of S.C. order (Justice Brennan) staying judgment of Ct of Appeals pending disposition of petition for writ of certiorari. (panel)

7/1/75 Filed certified copy of SC order granting petition for cert 6/23/75 (panel)

C.A. 9 Docket No. 73-2486:

8/9/73 Filed original and seven copies, Petition for Review of an Order of the EPA, pertaining to a state permit program submitted to the EPA by the governor, pursuant to § 402(b) of the Federal Water Pollution Control Act, etc.

9/19/73 Filed original and three copies of certified list of record in lieu of record pursuant to Rule 17(b). FRAP

10/29/73 Filed 25 appellants briefs

12/21/73 Filed original and three respondent's motion to consolidate appeal with 73-2466 to C

1/2/74 Filed Order (C) granting respondent's leave to consolidate appeal with 73-2466

3/22/74 Filed 25 appellants reply briefs (For State of Washington) Service 3/21/74

C.A. 9 Dockets No. 74-1189:

2/4/74 Filed original and nine copies of a petition to review an order of the Environmental Protection Agency

DATE	FILINGS—PROCEEDINGS

5/9/74 Filed respondents' motion for consolidation of case with 73-2486 as the record in this case and to supplement the record; (to O'Fallon)

5/23/74 Filed Order (Duniway & Choy) granting leave to consolidate appeal with 73-2486. The letter of Nov. 14, 1973 from Russell E. Train to the Hon. Daniel J. Evans will be added to the record in 73-2486, which will be the record for the consolidated proceeding.

9/9/74 Rec'd. 25 Amicus briefs (Commonwealth of Pennsylvania to panel

9/9/74 Filed Commonwealth of Pennsylvania's motion for leave to file late amicus brief to (panel)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

M/S #509

Jun. 12, 1973

[Jul. 14, '75, 2:50 PM, Land and Natural Resources Division, Department of Justice]

Mr. John A. Biggs
Director, Department of Ecology
State of Washington
P.O. Box 829
Olympia, Washington 98101

Dear Mr. Biggs:

I was pleased to receive your letter of June 5 indicating that you plan shortly to forward the formal application for the State of Washington to participate in the National Pollutant Discharge Elimination System (NPDES) program. I believe that the working relationship which has been underway between EPA's staff and yours in clarifying certain portions of the required submission have been quite fruitful.

With respect to the first area of concern discussed in your letter, Region X staff are prepared to discuss an understanding with the State of Washington relevant to waiver of EPA veto authority similar to that granted the State of California. We do see the need for the State to provide a listing or quantification by category of the entities for which you feel a waiver of veto would be appropriate. National EPA policy dictates that we will not consider waiver of EPA review for (1) discharges which may affect the state other than the one the discharge is in, (2) discharges into the ocean, or (3) discharges which contain toxic substances in toxic amounts. Any such waiver agreement that is reached in this point in time will be subject to evaluation as the State gains experience in implementing the permit pro-

gram. If that experience shows that additional areas of waiver would be appropriate, larger waiver provisions could be incorporated at a later time.

Region X agrees with your philosophy that if the State assumes responsibility for the permit program, it is somewhat incongruous that such responsibility does not include issuance of permits for Federal facilities. However, because of Federal policy with regard to Federal-State regulationships and as translated into the EPA permit regulations published May 22, 1973, EPA does not have the prerogative to delegate permit issuance for Federal facilities to any state. It is our understanding that this Federal philosophy may well be subject to challenge in the courts by interested states. Region X does, however, intend to pursue a closely cooperative relationship with the states as permit requirements are developed by EPA for Federal facilities.

I am asking Mr. Lyman Nielson, Director, Washington Operations Office, to be available at your request to assist the State in completing the formal submission requesting approval for Washington's permit program.

Sincerely,

James L. Agee
Regional Administrator

cc: Lyman Nielson

Ted Rogowski)
) 6-13-73
L. H. Miller)

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Honorable Daniel J. Evans
Governor of Washington
State Capitol
Olympia, Washington 98504

Dear Governor Evans:

Thank you for your letter of June 21, 1973, in which you requested approval for Washington to participate in the national permit system established by the 1972 amendments to the Federal Water Pollution Control Act.

We have reviewed the material submitted to us and find that it is missing important components. I have personally spoken with Mr. John Biggs, Director of the State of Washington Department of Ecology, and have informed him of our decision. Members of my staff will be meeting with members of Mr. Biggs' staff to discuss our concerns in the near future. In addition, I will be sending a detailed analysis of the submission to the Department of Ecology and the Thermal Power Plant Site Evaluation Council.

Within the next few weeks we will be initiating the issuance of permits under the National Pollutant Discharge Elimination System. We hope to have the joint sponsorship of the State of Washington for our actions on those permits so that we might continue to work closely on the issuance of permits.

We will continue to work closely with the State so that our efforts will lead to approval of the National

Pollutant Discharge Elimination System operated by the State of Washington.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

cc: John A. Biggs
Joseph F. Lightfoot

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Mr. John A. Biggs, Director
Department of Ecology
State of Washington
Post Office Box 829
Olympia, Washington 98501

Dear Mr. Biggs:

The State of Washington's request to participate in the National Pollutant Discharge Elimination System (NPDES) permit program has been analyzed by my staff and by the Headquarters staff of EPA. As the enclosed letter to Governor Evans indicates, we have determined that the Attorney General's Statement and the program description are missing important components. Consequently, the formal 90-day review period has not begun.

I have attached a detailed statement of our requested changes. My staff is ready to assist you or your staff to clarify or explain the comments contained in our attachment. We plan to have a meeting with members of your staff this coming Tuesday, July 24, in Olympia.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

2 Enclosures

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Mr. Joseph F. Lightfoot
Executive Secretary
Thermal Power Plant Site
Evaluation Council
820 East 5th Avenue
Olympia, Washington 98504

Dear Mr. Lightfoot:

The State of Washington's request to participate in the National Pollutant Discharge Elimination System (NPDES) permit program has been analyzed by my staff and by the Headquarters staff of EPA. As the enclosed letter to Governor Evans indicates, we have determined that the Attorney General's Statement and the program description are missing important components. Consequently, the formal 90-day review period has not begun.

I have attached a detailed statement of our requested changes. My staff is ready to assist you or your staff to clarify or explain the comments contained in our attachment. Please contact me if you wish to arrange for additional information or assistance.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

2 Enclosures

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

[Rec'd, U.S. Attorney, San Francisco, Calif. Refer to _____]

Aug. 7, 1973, 1:35 PM

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

RICHARD C. JACOBS
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: 557-3920

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER,

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS.

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

Petitioner hereby alleges:

I

ACTION AND JURISDICTION

1. This is an application for review of the action of the ENVIRONMENTAL PROTECTION AGENCY and ROBERT W. FRI, its Acting Administrator, in approving a state permit system pursuant to Section 402 [33 U.S.C. § 1342] of the Federal Water Pollution Control Act Amendments of 1972 [86 Stats. 816 et seq.; 33 U.S.C. § 1251 et seq.].

2. The jurisdiction of this Court is invoked pursuant to Section 509(b)(1)(D) [33 U.S.C. § 1369(b)(1)(D)] of the Federal Water Pollution Control Act Amendments of 1972.

VENUE

3. Venue in this action is based upon residence by Petitioner People of the State of California within the jurisdiction of the Ninth Circuit Court of Appeals of the United States, under Section 509(b)(1)(F) [33

U.S.C. § 1369(b)(1)(F)] of the Federal Water Pollution Control Act Amendments of 1972.

II.

PARTIES

4. Petitioner herein is the PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Water Resources Control Board.

5. The State Water Resources Control Board (the "State Board") is a public agency of the State of California duly created by the Legislature of the State of California, and consists of five members appointed by the Governor of the State of California. The State Board, pursuant to California Water Code section 13001, is a principal state agency with primary responsibility for the coordination and control of water quality. Pursuant to California Water Code section 13160, the State Board is the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act Amendments of 1972.

6. Respondent ENVIRONMENTAL PROTECTION AGENCY is an agency of the United States of America. Respondent ROBERT W. FRI is the Acting Administrator of said agency. As acting administrator, said FRI is charged with the duty and responsibility of administering the Federal Water Pollution Control Act Amendments of 1972 by Section 101(d) [33 U.S.C. § 1251(d)] of said amendments.

III.

STATUTORY PROVISIONS

7. The Federal Water Pollution Control Act Amendments of 1972 (the "Act") were passed by the Congress of the United States on October 18, 1972, over the veto of the President of the United States .

8. Section 101(a) [33 U.S.C. §1251(a)] of the Act states that "[t]he objective of the Act is to restore and

maintain the chemical, physical, and biological integrity of the Nation's waters."

9. Section 101(b) [33 U.S.C. §1251(b)] of the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."

10. Section 402 [33 U.S.C. § 1342] of the Act establishes a National Pollutant Discharge Elimination System (NPDES). The NPDES allows the Administrator to issue permits for the discharge into navigable waters of any pollutant or combination of pollutants, so long as the proposed discharge meets the requirements of the Act. Except in compliance with such a permit, the discharge of any pollutant by any person is made unlawful by Section 301 [33 U.S.C. § 1311] of the Act.

11. Section 402 [33 U.S.C. § 1342] of the Act further provides that each state which desires to administer its own permit system under the NPDES for discharges of pollutants into navigable waters within its jurisdiction, may submit to the Administrator a full and complete description of the program which it proposes to administer under state law. Section 402 provides that the Administrator "shall approve each such submitted program" which meets the requirements specified by the Act for such a program.

12. Under Section 313 [33 U.S.C. § 1323] of the Act, each department, agency or instrumentality of the executive, legislative and judicial branches of the Federal Government which has jurisdiction over any property or facility or is engaged in any activity resulting or which may result in the discharge of pollutants, must comply with Federal, State, interstate and local requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements, including the payments of reasonable service charges.

IV.

THE ADMINISTRATOR'S ACTIONS

13. Pursuant to Section 304(h)(2) [33 U.S.C. § 1314(h)(2)] of the Act, the Administrator was required to promulgate guidelines establishing the minimum elements necessary for a State to assume operation of the NPDES within its jurisdiction. The Administrator has promulgated such guidelines, and has caused them to be published at 37 Federal Register 28390 (December 22, 1972) and at 40 Code of Federal Regulations §§ 124.1-124.94.

14. The Governor of the State of California, pursuant to Section 402(b) [33 U.S.C. § 1342(b)] of the Act, submitted to the Administrator on February 15, 1973, a full and complete description of the program which the State proposed to operate within its jurisdiction as part of the NPDES. Said program was in compliance with the guidelines promulgated by the Administrator (40 C.F.R. §§ 124.1-124.94). Additional supplemental information concerning the proposed program was submitted to the Administrator on April 10, 1973.

15. By letter dated May 14, 1973, the Administrator purportedly approved the program heretofore described, and authorized the operation of the program proposed by the Governor. Pursuant to Section 402(c)(1) [33 U.S.C. § 1342(1)] of the Act, the Administrator purportedly suspended the issuance of permits by him under Section 402(a) [33 U.S.C. § 1342(a)] of the Act. The Administrator did not, however, suspend the issuance of permits by him for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal Government." A copy of said letter is attached hereto as Exhibit "A" and is incorporated herein as if set forth in full.

V.

UNLAWFUL ACTS BY THE ADMINISTRATOR

16. The failure of the Administrator to suspend the issuance of permits by him for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government" and, correlatively, the failure of the Administrator to approve the California permit program heretofore described insofar as it applies to agencies and instrumentalities of the Federal government, violates the limitations imposed upon his authority by the Act, and more particularly by Sections 402 and 313 of the Act [33 U.S.C §§ 1342 and 1323].

VI.

INJURY

17. By failing to suspend the issuance of permits for discharges into navigable waters "from agencies and instrumentalities of the Federal government" and, correlatively, by failing to approve the California permit program insofar as it applies to agencies and instrumentalities of the Federal government, the Administrator has prevented the State Water Resources Control Board, acting on behalf of the People of the State of California, from exercising its right and responsibility under Section 101(b) [33 U.S.C. § 1251(b)] of the Act, to "prevent, reduce, and eliminate pollution" and to "plan the development and use (including restoration, preservation and enhancement) of land and water resources" to the extent required by the Federal Water Pollution Control Act Amendments of 1972.

WHEREFORE, petitioner requests that:

1. This Honorable Court review the action of respondent ENVIRONMENTAL PROTECTION AGENCY and its Acting Administrator ROBERT W. FRI, in failing to suspend the issuance of permits by the Administrator for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government";

2. This Honorable Court declare that respondent ENVIRONMENTAL PROTECTION AGENCY and its Acting Administrator, ROBERT W. FRI, erred and exceeded their statutory powers by failing to suspend the issuance of permits by the Administrator for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government" and, correlatively, by failing to totally approve the proposed permit system heretofore described and submitted by the Governor of the State of California; and

3. This Honorable Court issue such other and further relief as it deems proper.

Dated: August 6, 1973.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
RICHARD C. JACOBS
Deputy Attorney General

/s/ Roderick Walston
RODERICK WALSTON
Deputy Attorney General
Attorneys for Petitioner

EXHIBIT "A"

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

[SEAL]

May 14, 1973

THE ADMINISTRATOR

Honorable Ronald Reagan
Governor of California
Sacramento, California 95814

Dear Governor Reagan:

Your request for approval to conduct a State permit program pursuant to the provisions of the National Pollutant Discharge Elimination System under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the "Act") is hereby approved. Accordingly, as of this date, I am suspending the issuance of permits by the Environmental Protection Agency under Subsection (2) of Section 402 of the Act as to all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government.

The permit program that you conduct pursuant to this authority must at all times be in accordance with Section 402 of the Act, all guidelines promulgated pursuant to Section 304(h)(2) of the Act, and the agreement between the Regional Administrator of EPA's Region IX and the Chairman of the California Water Resources Control Board, which I have also approved today.

During the period of interim authorization, your State indicated a willingness and ability to comply with both the spirit and the letter of the Act. Based upon this performance during the interim period and the description of the program that you submitted, I am pleased to approve California's permit program.

California is the first State to receive approval of a permit program under this comprehensive new water pollution law. Your State's actions in the past have shown that water quality can be controlled. Both EPA and I

are anxious to aid you in continuing this progress towards the elimination of water pollution.

Sincerely yours,

/s/ Robert W. Fri
ROBERT W. FRI
Acting Administrator

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2486

[Filed Aug. 9, 1973, Dennis R. Mathews, Clerk, U.S. Court of Appeals]

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as Acting Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

SLADE GORTON
Attorney General of the State of Washington

CHARLES B. ROE, JR.
Senior Assistant Attorney General

CHARLES W. LEAN
Assistant Attorney General

WICK DUFFORD
Assistant Attorney General
Attorneys for Petitioners
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-2354

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as Acting Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

This petition is an application for review of the action of the Environmental Protection Agency, United States of America, and Robert W. Fri, the Acting Administrator of the Environmental Protection Agency, acting through James L. Agee, Regional Director of Region X of the Environmental Protection Agency, in making a determination on July 20, 1973, pertaining to a state permit program submitted to the Environmental Protection Agency by the Governor of the State of Washington on June 21, 1973, pursuant to section 402(b) of the Federal Water Pollution Control Act Amendments of 1972. [86 Stats. 816 et seq.; 33 U.S.C. § 1251 et seq.] In further support and amplification of this application the following is submitted:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction by virtue of section 509 (b) of the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. 1369(b)].

2. Venue is based upon residence by petitioners within the jurisdiction of the Ninth Circuit Court of Appeals of the United States, under Section 509(b)(1)(F) [33 U.S.C. § 1369(b)(1)(F)] of the Federal Water Pollution Control Act Amendments of 1972.

II.

PARTIES

3. (a) Petitioner, State of Washington, is a sovereign state of the United States.

(b) Petitioner, Department of Ecology, is an agency of the State of Washington created by the state's legislature by Chapter 43.21A of the Revised Code of Washington (RCW). The Department of Ecology is, by Chapter 90.48 RCW, the state agency with primary responsibility for control and protection of the quality of the waters within the State of Washington. RCW 90.48.-260 designates the Department of Ecology as the state water pollution control agency for all purposes of the Federal Water Pollution Control Act ("the Act") as it now exists and authorizes said Department to participate fully in the programs of the Act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that Act. The powers provided the Department in RCW 90.48.260 included complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system.

5. Respondents are the Environmental Protection Agency, an agency of the United States of America, and Robert W. Fri, the Acting Administrator ("the administrator") of the Environmental Protection Agency. As the acting administrator, respondent Fri is charged with the responsibility of administering the Federal Water Pollution Control Act by section 101(d) of the Act; [33 U.S.C. 1251(d)].

III.

STATUTORY PROVISIONS

6. The Federal Water Pollution Control Act Amendments of 1972 [86 Stat. 816 et seq.] [33 U.S.C. 1251 et seq.] were passed by the Congress of the United States and became effective on October 18, 1972.

7. Section 101(a) ((33 U.S.C. 1251(a))) of the Act states that "[t]he objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

8. Section 101(b) ((33 U.S.C. 1251(b))) of the Act states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."

9. Section 402 (33 U.S.C. 1342) of the Act establishes a National Pollutant Discharge Elimination System (NPDES). The NPDES allows the Administrator to issue permits for the discharge into navigable waters of any pollutant or combination of pollutants, so long as the proposed discharge meets the requirements of the Act. Except in compliance with such a permit, the discharge of any pollutant by any person is made unlawful by section 301 (33 U.S.C. § 1311) of the Act. Section 402 of the Act further provides that each state which desires to administer its own permit system under the NPDES for discharges into navigable waters within its judisdiction may submit to the Administrator a full and complete description of the program which it proposes to administer under state law. Section 402 provides that the Administrator "shall approve each such submitted program" which meets the requirements specified by the Act for such a program.

10. Under section 313 of the Act [33 U.S.C. 1323], each department, agency or instrumentality of the executive, legislative and judicial branches of the federal gov-

ernment which has jurisdiction over any property or facility or is engaged in any activity resulting or which may result in the discharge of pollutants, must comply with federal, state, interstate and local requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements, including the payments of reasonable service charges, unless exempted from these requirements by the President of the United States.

IV.

THE ADMINISTRATOR'S ACTIONS

11. Pursuant to section 304(h)(2) of the Act [33 U.S.C. 1314(h)(2)], the Administrator was required to promulgate guidelines establishing the minimum elements necessary for a state to assume operation of the NPDES within its borders. The Administrator promulgated such guidelines, and caused them to be published at 37 Federal Register 28390 [December 22, 1972] and at 40 Code of Federal Regulations §§ 124.1-124.94.

12. The Administrator further adopted regulations prescribing the policies and procedures to be followed by him in connection with applications for permits issued by the Environmental Protection Agency pursuant to sections 402 and 405 of the act; said regulations being published at Federal Register 13527 and at 40 Code of Federal Regulations § 125. 40 CFR § 125.2 prescribes the policy and procedures to be followed in connection with permits authorizing discharges into navigable waters, the waters of the contiguous zone, and the oceans from any agency or instrumentality of the federal government and from any Indian activity on Indian lands, and further states the regulations of section 125.2 do not prescribe the policy and procedures to be followed in connection with permits by states under programs approved by the Administrator pursuant to section 402(b) of the Act. Such state programs, 40 CFR § 125.2 continues, do not cover agencies and instrumentalities of the federal government and Indian activities on Indian lands under the jurisdiction of the United States.

13. By letter dated June 12, 1973, the Regional Director of Region X of the Environmental Protection Agency, acting on behalf of the respondents, advised the petitioners that the Environmental Protection Agency does not, in relation to the approval of a submittal of a state program by the Governor of the State of Washington, have authority to "delegate permit issuance for federal facilities to any state."

14. After promulgation of the guidelines and regulations described in paragraph 11 and 12, Daniel J. Evans, the Governor of the State of Washington, pursuant to section 402(b) of the Act, submitted to the Regional Director of Region X of the Environmental Protection Agency as representative of the Administrator, on June 21, 1973, a full and complete description of the program which the state proposed to operate within its jurisdiction as part of the NPDES. The description of the program included a provision that discharges of pollutants to navigable waters from federal facilities were covered by the state program.

15. By letter dated July 20, 1973, the Regional Director of Region X of the Environmental Protection Agency, acting on behalf of the respondents, advised the Governor of the State of Washington that the Regional Director had reviewed the description of the program submitted and had determined that it was "missing important components" and by so doing disapproved the Governor's submission as described in paragraph 14. By letters also dated July 20, 1973, issued concurrently with the letter to the Governor, the Regional Director, acting on behalf of the respondents, advised the Director of the Washington State Department of Ecology and the Executive Secretary of the Washington State Thermal Power Plant Site Evaluation Council of the determination that respondents have "sole authority to issue permits to federal facilities" and implicitly determined that respondents are not empowered to approve a state program which includes the authority to issue permits under the NPDES relating to federal facilities.

16. By letter dated July 31, 1973, the Director of the Washington State Department of Ecology advised the

Regional Director of Region X of the Environmental Protection Agency that the Governor of the State of Washington would submit to the Administrator for approval a second full and complete description of the permit program the state proposes to operate within its jurisdiction as a part of the NPDES possibly as early as the end of August, 1973, but no later than the end of September, 1973.

V.

UNLAWFUL ACTS OF THE ADMINISTRATOR

17. The Administrator has, as described in the foregoing paragraphs, unlawfully determined as to a state program submitted to him under section 402(b) of the Act by the Governor of the State of Washington that federal facilities are not subject to any state permit program approved by the administrator as a part of the NPDES.

18. Stated further, the determination of refusal of the Administrator to consider for approval as a part of the program submitted by the Governor, as described in paragraph 15 hereof, pursuant to section 402(b) of the Act, that portion of the submission relating to the applicability thereof to federal facilities which discharge pollutants to waters covered by the NPDES and, implicitly, the determination by the Administrator that he would take the same position in relation to any resubmission by the Governor of the State of Washington in accordance with the intention, described in paragraphs 13 and 15 hereof, violates the provisions of the Act, more particularly sections 402 and 313 thereof.

VI.

INJURY

19. There are approximately fifty federal facilities discharging pollutants into navigable waters of the State of Washington covered by the Act and state law. By the determination to refuse to consider for approval any

NPDES program submission of the applicant containing provisions covering discharges of federal facilities, the Administrator has prevented the State of Washington, acting through its agencies the Department of Ecology and the Thermal Power Plant Site Evaluation Council, from exercising its powers and responsibilities to prevent, reduce, and eliminate pollution as provided by the Federal Water Pollution Control Act as well as by the water pollution control and protection laws of the State of Washington; primarily Chapter 90.48 of the Revised Code of Washington, and thereby limited the power of the State of Washington to control its own destiny by insuring, as best it can, the protection of the quality of navigable waters within its boundaries.

WHEREFORE, appellants request that this Honorable Court:

1. Review the determination of the Administrator, relating to the submission by the Governor of the State of Washington to the Administrator under section 402 (b) as described in paragraph 14 hereof, that the Administrator has no power to grant and will not approve as a part of any state permit program under the NPDES, authority to issue permits pertaining to federal facilities discharging pollutants to waters of the state, and

2. Declare that the Administrator erred and exceeded his authority by refusing to consider for approval that portion of the state permit program described in paragraph 14 or any future state permit program submitted to the Administrator by the Governor of the State of Washington for approval as a part of the NPDES under section 402(b)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Review of Agency Action by mailing by first class mail, a copy, postage prepaid, to each of the following:

Environmental Protection Agency
1626 K Street N.W.
Washington, D.C. 20460
Mr. Robert W. Fri, Acting Administrator
U.S. Environmental Protection Agency
1626 K Street N.W.
Washington, D.C. 20460

DATED this 6th day of August, 1973.

/s/ Charles B. Roe, Jr.
Charles B. Roe, Jr.
Senior Assistant Attorney General
State of Washington

[SEAL]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Nov. 14, 1973

THE ADMINISTRATOR

Dear Governor Evans:

Your request dated September 14, 1973, for approval to conduct a State Permit Program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the "Act") is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency under subsection (a) of section 402 of the Act as to all discharges in the State of Washington other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with section 402 of the Act, all guidelines promulgated pursuant to section 304(h)(2) of the Act, and the Memorandum of Agreement between the Regional Administrator of EPA's Region X and the Director of the Washington State Department of Ecology, which I have also approved today.

In addition, this approval is based upon your November 7 letter to Mr. Agee in which you state that modification of Washington's civil and criminal penalties will be recommended to the next regular session of the State legislature "so as to bring the State's laws into the same condition as counterpart Federal laws, both in terms of amount and in nature of conduct subject to such penalties." We feel maximum civil penalties of $10,000 and maximum criminal fines of $25,000 are desirable and necessary to avoid any weak links in the national chain of state permitting programs.

I also note in approving Washington's program today that you have made a commitment to submit amendatory legislation, including appropriate amendments to Chapter 90.48 RCW, to the January, 1975, legislative session in

order to solve inconsistencies between Washington's recently adopted NPDES regulations and earlier statutes. These adjustments should help to avoid unnecessary challenges to Washington's authority to issue and enforce NPDES permits.

I wish to emphasize my concurrence with Washington's goal as set forth in paragraphs 1 and 2 of II. POLICIES on page 2 of your Agreement with Region X, of issuing NPDES permits to all discharges in the State of Washington by December 31, 1974. Because of the severe consequences that could accrue to facilities discharging without an NPDES permit after that date, we urge that every effort be undertaken to ensure that this important commitment is achieved. The Region X staff stands ready to assist you in the writing and issuance of these permits. Washington has already set a good example by issuing more permits during its period of interim permit-issuing authorization than any other state.

I personally am encouraged by the following statements in your November 7 letter to Mr. Agee:

> "The NPDES is the heart of our nation's effort to eliminate the blight of water pollution. Successful implementation of its provisions is imperative. That achievement can come about only if the best efforts of both the state and federal governments are provided. By my submission, the State of Washington is so committed."

Speaking on behalf of the Environmental Protection Agency and its staff, let me assure you that we will do everything possible, including the minimization of time-consuming procedures and paper shuffling, to aid you in your commitment to eliminate the blight of water pollution.

Sincerely yours,

/s/ Russell E. Train
Russell E. Train

Honorable Daniel J. Evans
Governor of Washington
Olympia, Washington 98504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1189

[Filed Feb. 4, 1974, ————————, Clerk,
U.S. Court of Appeals]

[Received Feb. 4, 1974, ————————, Clerk,
U.S. Court of Appeals]

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY,
PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS.

APPLICATION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)]

SLADE GORTON
Attorney General of the
State of Washington

CHARLES B. ROE, JR.
Senior Assistant Attorney
General

CHARLES W. LEAN
Assistant Attorney General

WICK DUFFORD
Assistant Attorney General
Attorneys for Petitioners
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-2354

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS.

APPLICATION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)]

The State of Washington and its Department of Ecology hereby petition the court for review of the order of the Environmental Protection Agency of the United States of America, by its Administrator, Russell E. Train, respondents herein, dated November 14, 1973. Said order, in the form of a letter from Russell E. Train to Daniel J. Evans, Governor of the State of Washington, approved, with conditions, the program submitted to the respondents by Governor Evans, dated September 14, 1973, pursuant to 33 U.S.C. 1342(b).

The petitioners request the court to set aside that portion of the order of approval of the respondents which excludes federal facilities located in the State of Wash-

ington from the program submitted by the Governor of the State of Washington.

DATED this 30th day of January, 1974.

SLADE GORTON
Attorney General

/s/ Charles B. Roe, Jr.
CHARLES B. ROE, JR.
Senior Assistant Attorney General

/s/ Charles W. Lean
CHARLES W. LEAN
Assistant Attorney General
WICK DUFFORD
Assistant Attorney General
Attorneys for Petitioners

Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-2354

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by mailing by first class mail, a copy, postage prepaid, to each of the following:

Mr. Russell E. Train, Administrator
U.S. Environmental Protection Agency
Waterside Mall, 4th and M Street S.W.
Washington, D.C. 20460

Mr. James L. Agee, Regional Administrator
Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, Washington 98101

DATED this 31st day of January, 1974.

/s/ Charles B. Roe, Jr.
CHARLES B. ROE, JR.
Senior Assistant Attorney General
State of Washington

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

EVELLE J. YOUNGER
Attorney General

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
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RICHARD C. JACOBS
Deputy Attorney General
6000 State Building
San Francisco, California
Telephone: (415) 557-0285
Attorneys for State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

Petitioner, PEOPLE OF THE STATE OF CALIFORNIA respectfully moves this Court to augment the record in this proceeding, to include the affidavit of BILL B. DENDY, Executive Director of the State Water Resources Control Board. The grounds for this motion are set forth in the attached affidavit of RICHARD C. JACOBS, Deputy Attorney General of the State of California.

DATED: March 19, 1974

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General
RODERICK WALSTON
Deputy Attorney General

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

ORDER GRANTING MOTION TO AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

_____
Circuit Judge

AFFIDAVIT

No. 73/2466

STATE OF CALIFORNIA

v.

E.P.A.

I, RICHARD C. JACOBS, being first duly sworn, hereby state and declare as follows:

I am a Deputy Attorney General for the State of California, and an attorney for the petitioner herein.

In their reply brief, respondents have argued that section 313 of the Federal Water Pollution Control Act Amendments of 1972 requires federal agencies and installations to comply with state "substantive" laws, but does not require similar compliance with state "procedural" requirements including obtaining of state issued permits under the National Pollutant Discharge Elimination System. In our brief, filed herewith, we have argued that in fact substantive water quality standards under California law are developed only through an administrative hearing process leading to the issuance of waste discharge requirements. We have also argued that the position of respondents would result in the issuance of permits by the Administrator to federal agencies, with different standards and conditions than if the same permits were issued by the State of California. We have further contended that such a result is inconsistent with the language of section 313 that federal agencies comply with state "requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements. . ."

The affidavit of BILL B. DENDY, the subject of petitioner's motion to augment the record, states that on two separate occasions, the Administrator of the Environmental Protection Agency has issued permits to federal facilities, but has failed to include therein con-

ditions requested by the State Water Resources Control Board and a regional board. The affidavit is therefore offered to show that the actual practice of the Administrator under the National Pollutant Discharge Elimination System underscores the validity of petitioner's position herein.

The Dendy affidavit further briefly states the actions of federal agencies and the State Board with respect to various water appropriative permits issued to the United States Bureau of Reclamation. The affidavit is accordingly also offered to show further acts of the federal government and State Board with respect to federal compliance with state law, other than National Pollutant Discharge Elimination System permits.

Executed under penalty of perjury on March 19, 1973, in San Francisco, California.

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-2466
73-2486

PEOPLE OF THE STATE OF CALIFORNIA et rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

AFFIDAVIT OF BILL B. DENDY

I, Bill B. Dendy, being first duly sworn, hereby state and declare as follows:

I am the Executive Officer of the State Water Resources Control Board. I have held this position since March 1, 1972. Under the general direction and control of the Board, I exercise supervision of the functions of the Board and plan, organize, direct and coordinate the activities of the staff of the Board.

Pursuant to California law, specifically the Dickey Act adopted in 1949 and the Porter-Cologne Water Quality Control Act adopted in 1969, federal agencies have applied to California's regional water quality control boards for requirements applicable to specific waste discharges from federal installations. Applications for requirements have been filed by the army base at Fort Ord and twenty-nine other federal facilities in the San Francisco Bay area. Some federal agencies, such as the U.S. Air Force and the U.S. Department of Commerce, have paid the filing fees required by state law. Pursuant to these applications for requirements, the regional boards have conducted administrative proceedings, which were participated in by the appropriate federal agency, and have issued requirements applicable to the specific discharge.

On two recent occasions where the Administrator of the Federal Environmental Protection Agency (Administrator) has issued permits for the discharge of pollutants from federal facilities to waters of the State, the Administrator has refused to include conditions in the permit as requested by the State Board and a regional water quality control board and has instead inserted his own conditions in the permits. Specifically, the Administrator issued permit No. CA 0002071 on September 30, 1973 to the U.S. Air Force—Norton Air Force Base—for a discharge of storm runoff from airplane parking areas. The recommendations of the State Board and the California Regional Water Quality Control Board, Santa Ana Region, were not incorporated into the permit. On December 31, 1973 the Administrator issued permit No. CA 0002062 to the U.S. Air Force—Norton Air Force Base—for a discharge of 0.11 million gallons per day of industrial waste water. The Administrator failed to include a limit on total dissolved solids as requested by the State Board.

On July 28, 1971, the State Water Resources Control Board adopted Decision 1379, and thereby imposed various conditions, limitations and restrictions upon water appropriation permits previously issued to the U.S. Bureau of Reclamation. Such permits allowed the U.S. Bureau of Reclamation to divert water from the Sacramento-San Joaquin Delta for use in various federal reclamation projects in California. The authorization to divert water was contained in permits issued in response to applications submitted by the United States. Conditions were attached to the permits which required the United States to release water from storage and discontinue diversions when necessary to achieve certain water quality standards in the Delta (set forth in Decision 1379 as the "Delta Standards"), which standards are designed to prevent the intrusion of salinity in the Delta.

In issuing water appropriation permits, the State Water Resources Control Board is required, under California Water Code Section 1253, 1255 and 1257, to consider the "public interest". The Board is also required to comply with the provisions set forth in the

California Environmental Quality Act, found in Section 2100 et seq. of the California Public Resources Code.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 1974, at Sacramento, California.

/s/ Bill B. Dendy
Bill B. Dendy
Executive Officer

Subscribed and sworn to before me this 5th day of March, 1974.

/s/ Gail F. Draper
GAIL F. DRAPER
Notary Public, Sacramento County, Calif.

[SEAL]

GAIL F. DRAPER
Notary Public
Sacramento County, California
My Commission Expires Apr. 15, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

JOANIE MITCHELL, being first duly sworn, on oath deposes and states:

I am a citizen of the United States, over 18 years of age and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW on the following by placing same in an envelope (or envelopes) addressed (respectively) as follows:

MR. CHARLES ROE
Office of the Attorney General
Temple of Justice
Olympia, Washington 98501
MR. RAYMOND W. MUSHAL
Attorney
Department of Justice
Washington, D.C. 20530

Each said envelope was then, on March 19, 1974, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Joanie Mitchell
Affiant

Subscribed and sworn to before me this —— day of _____, 19 ——.

_____
Notary Public in and for said
County and State

11-71 SF 2

UNITED STATES COURT OF APPEALS
THE NINTH CIRCUIT

No. 73-2466

[Filed May 23, 1974, ————————————, Clerk,
U.S. Court of Appeals]

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

vs.

ENVIRONMENTAL PROTECTION AGENCY, and
ROBERT W. FRI, Acting Administrator, RESPONDENTS

Before: DUNIWAY and CHOY, Circuit Judges

ORDER

Petitioner's motion to augment the record in this matter with the affidavit of BILL B. DENDY is granted.

/s/ Ben C. Duniway

/s/ Herbert Y. C. Choy
U.S. Circuit Judges

MoCal 5/20/74

ATTORNEY GENERAL — OFFICE COPY
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Aug. 15, 1974, ————————————, Clerk,
U.S. Court of Appeals]

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

EVELLE J. YOUNGER
Attorney General

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
RICHARD C. JACOBS
Deputy Attorney General
6000 State Building
San Francisco, California
Telephone: (415) 557-0285
Attorneys for State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
STATE WATER RESOURCES CONTROL BOARD, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

Petitioner, PEOPLE OF THE STATE OF CALIFORNIA, respectfully moves this Court to augment the record in this proceeding, to include the affidavit of BILL B. DENDY, Executive Director of the State Water Resources Control Board. The grounds for this motion are set forth in the attached affidavit of RICHARD C. JACOBS, Deputy Attorney General of the State of California.

DATED: August 15, 1974.

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General
RODERICK WALSTON
Deputy Attorney General

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

ORDER GRANTING MOTION TO AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

_____
Circuit Judge

AFFIDAVIT

No. 73-2466

STATE OF CALIFORNIA

v.

E.P.A.

I, RICHARD C. JACOBS, being first duly sworn, hereby state and declare as follows:

I am a Deputy Attorney General for the State of California, and an attorney for the petitioner herein.

In their reply brief, respondents have argued that section 313 of the Federal Water Pollution Control Act Amendments of 1972 requires federal agencies and installations to comply with state "substantive" laws, but does not require similar compliance with state "procedural" requirements including obtaining of state issued permits under the National Pollutant Discharge Elimination System. In our briefs we have argued that in fact substantive water quality standards under California law are developed only through an administrative hearing process leading to the issuance of permits and waste discharge requirements. We have also argued that the position of the respondents would result in the issuance of permits by the Administrator to federal agencies, with different standards and conditions than if the same permits were issued by the State of California. We have further contended that such a result is inconsistent with the language of section 313 that federal agencies comply with state "requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements . . ."

The affidavit of BILL B. DENDY, the subject of petitioner's motion to augment the record, states that the Administrator of the Environmental Protection Agency has recently issued a permit to the U.S. Air Force Point Arena Radar Station for the discharge of pollutants to the Garcia River, after being advised by the North Coast

Regional Water Quality Control Board that the Interim Basin Plan for the North Coast Region prohibited such a discharge, and that waste discharge requirements previously adopted by the North Coast Board for the Station prohibited any such discharge. The affidavit is therefore offered to show that the actual practice of the Administrator under the National Pollutant Discharge Elimination System results in standards for federal agencies different than those which would have been imposed by the State of California, and thereby the validity of petitioner's position herein.

The Court has previously granted petitioner's motion to augment the record with a similar affidavit.

Executed under penalty of perjury on August 15, 1974, in San Francisco, California.

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-2466, 73-2486

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL TRAIN AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

AFFIDAVIT OF BILL B. DENDY

I, Bill B. Dendy, being first duly sworn, hereby state and declare as follows:

I am the Executive Officer of the State Water Resources Control Board. I have held this position since March 1, 1972. Under the general direction and control of the Board, I exercise supervision of the functions of the Board, and plan, organize, direct, and coordinate the activities of the staff of the Board.

Pursuant to California law, specifically the Dickey Act adopted in 1949 and the Porter-Cologne Water Quality Control Act adopted in 1969, federal agencies have applied to California's regional water quality control boards for requirements applicable to specific waste discharges from federal installations. Applications for requirements have been filed by the army base at Fort Ord and twenty-nine other federal facilities in the San Francisco Bay area. Some federal agencies, such as the U.S. Air Force and the U.S. Department of Commerce, have paid the filing fees required by state law. Pursuant to these applications for requirements, the regional boards have conducted administrative proceedings, which were participated in by the appropriate federal agency, and have issued requirements applicable to the specific discharge.

Recently, the Administrator of the Federal Environmental Protection Agency (Administrator) issued a permit for the discharge of pollutants from the United States Air Force Point Arena Radar Station to the watrs of the State. The Administrator has refused to include conditions in the permit as requested by a California regional water quality control board and has instead inserted his own conditions in the permits. Specifically, the Administrator issued permit No. CA 0110418 on May 14, 1974, to the U.S. Air Force Point Arena Radar Station for a discharge of treated domestic wastewater, swimming pool backwash water and filter backwash from the water supply pumping station to the Garcia River. The recommendations of the California Regional Water Quality Control Board, North Coast Region, were not incorporated into the permit." On March 1, 1974, the Regional Board informed the Administrator that:

> "We believe that the issuance of a permit for the Point Arena Air Force Station is unwarranted for the following reasons:
>
> 1. The facility does not discharge to surface waters.
> 2. The Interim Basin Plan for this Region does not permit a discharge to coastal streams. The Garcia River is considered a coastal stream.
> 3. Order No. 73-10, Waste Discharge Requirements for the Point Arena Air Force Station, which were adopted by the Regional Board on January 24, 1973, prohibit the discharge of waste to the Garcia River and it's tributaries."

I certify under penalty of perjury that the foregoing is true and correct.

Executed on August 12, 1974, at Sacramento, California.

/s/ Bill B. Dendy
BILL B. DENDY
Executive Director

Subscribed and sworn to before me this 12th day of August, 1974.

/s/ Gail F. Draper
Notary Public in and for the
County of Sacramento,
State of California

[SEAL]

GAIL F. DRAPER
Notary Public
Sacramento County, California
My Commission Expires Apr. 15, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

JOANIE MITCHELL, being first duly sworn, on oath deposes and states:

I am a citizen of the United States, over 18 years of age and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached Motion to Augment Record on Petition For Review on the following by placing same in an envelope (or envelopes) addressed (respectively) as follows:

MR. CHARLES ROE
Office of the Attorney General
Temple of Justice
Olympia, Washington 98501

MR. RAYMOND N. MUSHAL
Attorney
Department of Justice
Washington, D.C. 20503

Each said envelope was then, on August 15, 1974, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Joanie Mitchell
Affiant

Subscribed and sworn to before me this 19th day of August, 1974.

/s/ Florence E. Crozier
Notary Public in and for said
County and State

[SEAL]

FLORENCE E. CROZIER
Notary Public—California
County of San Francisco
My commission expires Mar. 1, 1978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

[Filed Aug. 22, 1974, Emil E. Melfi, Jr., Clerk,
U.S. Court of Appeals]

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL TRAIN AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

ORDER GRANTING MOTION TO
AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

/s/ Eugene A. Wright
Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
PETITIONERS

v.

CALIFORNIA ex rel. STATE WATER RESOURCES
CONTROL BOARD, et al.

ORDER ALLOWING CERTIORARI. Filed June 23, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is set for oral argument in tandem with No. 74-220, Hancock v. Train.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 586898 9

Supreme Court, U. S.
FILED
JUN 4 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD and STATE OF WASHINGTON, et al.,
Respondents.

Joint Memorandum of Respondents California and Washington in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

EVELLE J. YOUNGER
Attorney General of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

RICHARD C. JACOBS
Deputy Attorney General

6000 State Building
San Francisco,
California 94102

Attorneys for California

SLADE GORTON
Attorney General of Washington

CHARLES B. ROE, JR.
Senior Assistant Attorney General

WICK DUFFORD
Assistant Attorney General

Temple of Justice
Olympia, Washington 98504

Attorneys for Washington

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD and STATE OF WASHINGTON, et al.,
Respondents.

Joint Memorandum of Respondents California and Washington in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT MEMORANDUM OF RESPONDENTS CALIFORNIA AND WASHINGTON

This case presents the question whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act, Amendments of 1972 (the "water act"). 33 U.S.C. §§ 1251-1376. We believe that the decision of the Ninth Circuit below, in holding that the water act imposes such an obligation on federal agencies, is correct. See *State of California et al. v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975). On this ground, the Court should

properly deny the petition for writ of certiorari filed by the Environmental Protection Agency ("EPA").

However, we recognize that several factors, unrelated to the merits of the Ninth Circuit's decision, militate in favor of the Court granting the EPA's petition. First, the issues in this case are of national importance, since they affect each state which receives federal authorization to develop and enforce its own water quality control program under the water act.[1]

Second, and more significantly, the Court has already decided to review the decision of the Sixth Circuit in *Kentucky v. Ruckelhaus,* 497 F.2d 1172 (6th Cir. 1974), *cert. granted sub. nom. Kentucky v. Train,* No. 74-220 (March 17, 1975). That case presents the related question whether federal agencies must obtain and comply with air quality control permits issued by the states under the Clean Air Act (the "air act"). 42 U.S.C. §§ 1857-1857l. The two cases are so interrelated that it is difficult for the Court to decide one case without considering the issues raised in the other case, yet sufficiently different that the Court cannot definitively resolve the issues in one case by simply resolving the issues in the other case.

In its petition in the instant case, the EPA enumerated certain similarities between the air and water acts, and concluded that both acts "should be interpreted in a manner consistent with each other." Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit [hereinafter "Petition"], 6. According to the EPA, the acts are so substantially identical that whatever decision the Court reaches in the *Kentucky* case should be

1. Twelve states have currently received such authorization. California was the first state, and Washington the fourth, to receive such authorization.

applied in the instant case. If this conclusion were correct, the Court might be justified in withholding action on the EPA's petition until it has decided the *Kentucky* case, on the assumption that its decision in that case will resolve the issues in the instant case.

However, the EPA's position overlooks, or ignores, the fundamental differences between the air and water acts. The water act contains a number of provisions not found in the air act, which—as the Ninth Circuit noted in the instant case (511 F.2d at 973)—provide a far stronger footing for state authority under the water act than under the air act. The dissimilarities between the acts may persuade the Court to construe the states' authority under the acts differently; in that event, the Court must distinguish between the states' authority under each act on the basis of dissimilarities appearing in the acts. However, the similarities between the acts may persuade the Court to construe the states' authority under the acts harmoniously, as the EPA urges; in that event, the provisions found solely in the water act may be helpful in explaining the congressional intent behind the air act. Thus, the dissimilarities between the acts may be used as the basis for distinguishing between the states' powers under each act, or instead as the basis for construing the air act in light of provisions appearing in the water act. In either event, the Court cannot consider the acts separately, or definitively resolve the issues in the instant case by resolving the issues in the *Kentucky* case. Both acts must be analyzed simultaneously, in order to determine the extent to which they are *in pari materia.* Thus, if the Court does not expeditiously deny the EPA's petition, it should grant the petition and consider the instant case at the same time that it considers the *Kentucky* case.

The oversimplification of the EPA's analysis of the instant case is apparent from its reading of the Ninth Circuit's decision. In support of its view that the air and water acts must be construed harmoniously, the EPA asserts that the Ninth Circuit's decision, in upholding the position of the states under the water act, "is contrary to the decision of the Sixth Circuit" in the *Kentucky* case. Petition, 5. However, closer analysis indicates that the Ninth Circuit's decision was based, in large part, on those provisions of the water act not found in the air act. Accordingly, the Ninth Circuit noted that its decision "would not be inconsistent with either an affirmance or a reversal of the district court's decision in *Stastny*" (511 F.2d at 973); the *Stastny* decision arose under the air act, and reaches a result identical to that of the Sixth Circuit in the *Kentucky* case.[2] Thus, the Ninth Circuit's decision, although helpful to the states' position in the *Kentucky* case, is not inconsistent with the Sixth Circuit's decision in that case. This strengthens our view that, if the *Kentucky* decision is correct, the water and air acts are distinguishable with respect to the extent of state authority, and the two acts are thus not capable of harmonious construction.

We will now focus more closely on the similarities and dissimilarities of the air and water acts, to show the need for simultaneous judicial construction of both acts.

1. Similarities of the Air and Water Acts.

The primary issue in the *Kentucky* case involves the meaning of section 118 of the air act, which provides that

2. The *Stastny* case, decided by a lower federal court, is now pending before the Ninth Circuit. See *California v. Stastny*, 382 F.Supp. 222 (C.D. Cal.), *appeal pending*, No. 72-2905 (9th Cir.).

federal agencies "shall comply with Federal, *State*, interstate, and local *requirements* respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. § 1857f. (Emphasis added). The primary issue in the instant case involves the meaning of section 313 of the water act, which provides that federal agencies "shall comply with Federal, *State*, interstate, and local *requirements* respecting control and abatement of pollution to the same extent that any person is subject to such requirements, *including the payment of reasonable service charges.*" 33 U.S.C. § 1323. (Emphasis added.) Thus, both cases hinge on the meaning of the word "requirements," as it appears in sections 118 and 313.

In both cases, the Administrator of the EPA has interpreted the word "requirements" as referring to state substantive requirements, not state procedural requirements. Hence, although the Administrator concedes that federal agencies must comply with substantive "standards" and "limitations" imposed by the states, he denies that such agencies must secure, or comply with, permits issued by the states.

Many common arguments are raised by the Administrator in both cases. For instance, the Administrator claims that the applicability of state permit programs to federal agencies "could result in the transfer to state governments of significant control over federal facilities." Petition 7. The states respond in both cases that the acts contain abundant safeguards against undue interference by the states with the control of federal facilities, and that the limited power which Congress gave to the states to control air and water pollution from federal facilities is a proper

exercise of the congressional power. Also, the Administrator cites the legislative history of both acts, which contains common references that federal agencies must comply with state "standards" and "limitations"; the Administrator argues that these references are synonymous with substantive requirements, and thus do not reveal a congressional intent to require federal compliance with state permit programs. The states in both cases respond that these references set forth the goals of the air and water acts, not the method by which these goals are to be attained.[3]

The states also raise many common arguments in both cases. For instance, provisions in each act distinguish between, first, a "standard" or "limitation", and second, a "requirement respecting control and abatement" of pollution, the phrase which appears in sections 313 and 118. *Compare* 42 U.S.C. § 1857d-1, *with* 33 U.S.C. § 1370. This distinction undermines the Administrator's argument that these terms are to be construed synonymously. The states in both cases further contend that it is administratively impossible for a state to develop substantive "requirements" respecting the control and abatement of pollution unless the requirements can be tailored to the exigencies of the particular activity resulting in pollution, a process that necessarily entails an administrative proceeding for the purpose of considering the nature and effect of such activity; thus, the states contend, a substantive requirement implicitly includes a procedural requirement as well. Finally, both acts provide that the "primary" responsibility for preventing pollution rests upon the states (*compare* 42 U.S.C. § 1857(a)(3), *with* 33 U.S.C. § 1251(b)), and that the states may impose more "stringent" standards than those imposed by the Administrator (*compare* 42 U.S.C. § 1857d-1, *with* 33 U.S.C. § 1370); in both cases, the states contend that these provisions vest them with responsibilities which cannot be fulfilled unless the states are authorized, through the permit process, to control pollution by federal agencies.

3. The Administrator also relies on a presidential executive order issued after the passage of the air and water acts, which requires federal agencies to comply with state "substantive standards and substantive limitations" under both acts, but not with state "administrative procedures." Exec. Order No. 11752, 3 C.F.R. 380 (1973). The states in both cases reject the executive order as a proper interpretation of the air and water acts.

2. Dissimilarities of the Air and Water Acts.

The dissimilarities of the air and water acts are more striking than the similarities, however. Section 313, after describing the obligation of federal agencies to comply with state "requirements", provides an example of such requirements by using the phrase "including the payment of reasonable service charges." This phrase is not found in section 118. The EPA asserts that the phrase only authorizes federal agencies to compensate states "for use of their sewerage systems," and does not appear in the air act because the states do not provide comparable services for air pollutants discharged from federal facilities. Petition, 7-8 n. 4. However, the Ninth Circuit disposed of this argument by noting that the phrase would be redundant under this interpretation; federal agencies are already authorized, independently of the water act, to compensate states for use of their sewage systems, if state law so requires. 511 F.2d at 969-70. Hence, the court concluded, the phrase is intended to assure that federal agencies are authorized to pay charges incident to the issuance of a permit by the

states, and thus indicates that federal agencies must seek and comply with such permits. *Ibid.*

The variation in the language of sections 313 and 118 is critical in defining the meaning of each section. If the Court upholds the EPA's view that the sections must be read harmoniously, it must then interpret the meaning of the "reasonable service charges" phrase in section 313 in order to apply that meaning to section 118. However, the Court might instead conclude that the absence of that phrase in section 118 denotes a congressional intent that the section should be construed differently from section 313, and that the former section—unlike the latter—does not require federal agencies to comply with state permit programs. Under either approach, the Court must view both sections together, in order to ascertain the proper scope and limits of each.

Moreover, the air and water acts are fundamentally different with respect to the programs which the states are authorized to adopt, a fact which may critically bear on the kinds of "requirements" applicable to federal agencies under each act. The EPA asserts that both acts authorize the states to submit a "plan" for the abatement of pollution, and that the acts are "substantially identical" in this respect. Petition, 5-6. However, this assertion is misleading, for the acts are fundamentally different in this respect.

The air act authorizes the states to adopt an implementation "plan" to achieve the ambient air quality standards set by the Administrator. 42 U.S.C. § 1857c-5. It is not clear, however, whether the authority to adopt such a "plan" also encompasses the authority to issue permits. Thus, the act does not expressly authorize the states to issue permits, but at best merely implies such authorization.

However, the water act expressly authorizes the states to develop and enforce a "permit program" to achieve the standards provided in the act. 33 U.S.C. § 1342(b). The act specifically describes a "permit" as an example of a "requirement" within the meaning of section 313. *Id.* at § 1365(f)(6). When the Administrator approves a state permit program, he *must* suspend the issuance of his own permits. *Id.* at § 1342(c). Nothing in the act indicates that the Administrator, upon approval of a state program, may retain authority to issue permits to federal agencies. Thus, the act expressly contemplates the issuance of permits by the states, to the exclusion of permits issued by the Administrator. Accordingly, the water act provides a stronger basis than the air act for concluding that federal agencies must comply with state permit programs.

If the Court agrees with the EPA's view that the air and water acts are to be read harmoniously, the lack of specificity in the air act concerning the states' permit-issuing authority may prove no obstacle to the position asserted by the states under that act. However, the Court may instead conclude that the lack of such specificity in the air act reveals a congressional design that the air act—unlike the water act—does not require federal compliance with state permit programs. In the latter event, the Court must distinguish between the air and water acts on the basis of the express powers delegated to the states under each act. This strengthens our view that the acts must be read together in defining the states' authority under each act.

Additionally, the history of the air and water acts is markedly different. Section 313 of the water act succeeded section 21(a) of the 1970 amendments to the water act, which required federal agencies to comply with "applicable water quality *standards*". 84 Stat. 107, *formerly* 33 U.S.C.

§ 1171(a). (Emphasis added). The legislative history of the earlier section shows that Congress intended that it include both state and federal standards. H.R.Rep., No. 91-127, 91st Cong., 2d Sess. 19 (1970). The change from the word "standards" in section 21(a) to the word "requirements" in section 313 undermines the Administrator's argument that the words must now be read synonymously. No such similar history, however, preceded the adoption of the air act. Thus, again, the Court might use the history of the water act as a guide to the meaning of the air act, or instead as a basis for differentiating between the acts.

Finally, the air and water acts differ significantly with respect to the method by which the Administrator's approval of a state program may be judicially reviewed. The air act authorizes "citizens suits" to be filed in a federal district court against any person, including the United States, who violates an "emission standard or limitation", or an order issued by the Administrator pursuant thereto. 42 U.S.C. § 1857h-2. In the *Kentucky* case, the Sixth Circuit relied on this provision in concluding that the doctrine of sovereign immunity precludes an action against the United States to require federal agencies to obtain permits from the states. 497 F.2d at 1175-76. However, the water act specifically authorizes an action to be filed in the appropriate Court of Appeals to review the Administrator's decision "in making any determination as to a State permit program" under the act. 33 U.S.C. § 1369(b)(1). Hence, if the Court should uphold the *Kentucky* decision on the issue of sovereign immunity, it should distinguish between the air and water acts on this issue. This factor further sustains our view that the acts must be analyzed together in order to determine the proper scope and limits of each act.

CONCLUSION

The air and water acts must be read in part, but not necessarily in whole, *in pari materia*. Judicial comparison of both acts is necessary to determine whether the acts are to be read harmoniously or disharmoniously, with respect to the obligation of federal agencies to comply with state permit programs. The many dissimilarities of the acts may induce the Court to interpret the air act in accordance with the more specific provisions found in the water act, or may instead induce the Court to distinguish between the acts. In the latter event, the Court must make proper distinctions on the basis of terminological, structural and historical differences in the acts. Otherwise, the Court might foreclose a proper interpretation of the water act by its decision in the *Kentucky* case, without seriously considering whether the acts' differences justify differing constructions of sections 118 and 313. For instance, in reviewing the *Kentucky* case, the Court might uphold the federal position that, in light of the legislative history of section 118, states are without authority to issue permits to federal agencies under that section; since the congressional history of section 313 is similar to that of section 118, the Court's decision would effectively resolve the issues in the instant case, without proper weight having been given to the many differences in the air and water acts which should lead to a different result.

Accordingly, we respectfully suggest that, if the Court does not speedily deny the EPA's petition, the instant case and the *Kentucky* case should be heard and considered at the same time, but not otherwise consolidated. In that event, the Court should grant the EPA's petition for a writ

of certiorari, and set the two cases for hearing on the same date, but at different times.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

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No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 511 F.2d 963.[1]

JURISDICTION

The opinion of the Court of Appeals (Pet. App. 35a-36a) was entered on February 13, 1975. The petition for a writ of certiorari was filed on May 14,

[1] Under the Federal Water Pollution Control Act, original jurisdiction is in the court of appeals. 33 U.S.C. (Supp. III) 1369(b)(1)(D).

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1975, and granted on June 23, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act, as amended in 1972, requires federal facilities that discharge water pollutants to obtain state effluent discharge permits to continue operating, or whether the federal facilities are required to comply only with state substantive water pollution control requirements.

STATUTES AND REGULATION INVOLVED

Section 313 of the Federal Water Pollution Control Act, as added, 86 Stat. 875, 33 U.S.C. (Supp. III) 1323, provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no

> exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

Sections 306, 308, 402, 505, 509, and 510 of the Federal Water Pollution Control Act, as added, 86 Stat. 854, 858, 880, 888, 891, and 893, 33 U.S.C. (Supp. III) 1316, 1318, 1342, 1365, 1369, and 1370, in pertinent part, are reprinted in the Appendix, *infra*, pp. 43 to 52.

Section 125.2(b) of Title 40, C.F.R., provides as follows:

> The regulations in this part do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator pursuant to section 402(b) of the Act. Such State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States.

STATEMENT

In our brief in *Kentucky ex rel. Hancock* v. *Train*, No. 74–220, certiorari granted, March 17, 1975,[2] we argued that under Section 118 of the Clean Air Act, as amended in 1970, 84 Stat. 1689, 42 U.S.C. 1857f, federal facilities must comply with state air emission standards or limitations, but are not required to obtain permits from state air pollution authorities in order to operate. Similarly, in the instant case the issue is whether federal facilities, in order to operate, must seek and obtain discharge permits from state agencies under Section 313 of Federal Water Pollution Control Act, as added in 1972, 33 U.S.C. (Supp. III) 1323—a provision derived from and virtually identical to Section 118 of the Clean Air Act.

A. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

In 1948, Congress enacted a major piece of legislation aimed at controlling water pollution:[3] the Federal Water Pollution Control Act. Under the original Act, as revised on numerous occasions prior to 1972,[4] the primary control mechanisms were state-developed ambient water quality standards, specifying permissible levels of pollution in particular bodies of water.[5]

[2] A copy of which we are furnishing counsel for respondents.

[3] Act of June 30, 1948, 62 Stat. 1155.

[4] See Arnold, *Effluent Limitations and NPDES: Federal and State Implementation of the Federal Water Pollution Control Act Amendments of 1972*, 15 B. C. Indus. & Comm. L. Rev. 767, n. 2 (1974).

[5] See Act of Oct. 2, 1965, Sec. 5(a), 79 Stat. 907. If the standards set by the state were too low, the Act provided a conference procedure among state and federal representatives to establish new standards. *Ibid.*

When a discharge resulted in reducing the quality of the water below this level, the state could initiate an enforcement conference among state, federal and industry representatives.[6] The federal enforcement role was limited to interstate pollution endangering health or welfare;[7] the federal government could commence an abatement suit only if the conference and a subsequent hearing had failed to result in agreement among the parties;[8] and if the pollution threatened only the health of citizens within the discharger's state, the state's Governor had to give his written consent to the federal abatement suit.[9] In 1971, the Senate Committee on Public Works, reporting on the bill that evolved into the FWPCA Amendments of 1972, found that under the existing legislation "the national effort to abate and control water pollution has been inadequate in every vital aspect" (2 *Legis. Hist.* 1425).

By the Federal Water Pollution Control Act Amendments of 1972,[10] Congress took a new approach to the problems of abating water pollution. In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the revised Act declares that it is the national goal to eliminate

[6] 79 Stat. 907.

[7] *Ibid.*

[8] Act of July 9, 1956, Sec. 8(f), 70 Stat. 505.

[9] *Ibid.* For a description of the operation of the Act prior to 1972, see S. Rep. No. 92–414, 92d Cong., 1st Sess. 1–7 (1971), reprinted in 2 *Legis. Hist.* 1419–1425. ("*Legis. Hist.*" refers to the legislative history of the FWPCA Amendments of 1972, compiled by the Environmental Policy Division of the Library of Congress in two volumes (Committee Print, "*A Legislative History of the Water Pollution Control Act Amendments of 1972*," 93d Cong., 1st Sess. (1973)).

[10] Act of Oct. 18, 1972, 86 Stat. 816.

discharges into navigable waters by 1985.[11] This goal is to be achieved primarily by three methods set forth in the new legislation. First, the Environmental Protection Agency is required to undertake an extensive program of research and demonstration of waste treatment methods.[12] Second, the Act authorizes a massive construction program for municipal waste treatment facilities, with the federal government contributing 75 percent of the cost.[13] The third change, which is directly involved in this case, is the establishment of a new system of standards, permits and enforcement.[14]

Instead of relying upon water quality standards as the primary control mechanism,[15] the revised Act utilizes effluent limitations applicable to point sources of pollution. The term "point source" is defined as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged."[16] Effluent limitations are restrictions established on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"

[11] Section 101(a) of the FWPCA Amendments of 1972, 33 U.S.C. (Supp. III) 1251(a).

[12] *Id.* Sections 104(d), 105(d), 33 U.S.C. (Supp. III) 1254(d), 1255(d).

[13] *Id.* Sections 201–212, 33 U.S.C. (Supp. III) 1281–1292.

[14] *Id.* Sections 301–405, 33 U.S.C. (Supp. III) 1311–1345.

[15] Water quality standards under the old Act are, however, retained: if despite effluent limitations the water quality in a certain watering is unacceptable, more stringent limitations can be established. *Id.* Sections 302, 303, 33 U.S.C. (Supp. III) 1312, 1313.

[16] *Id.* Section 502(14), 33 U.S.C. (Supp. III) 1362(14).

of discharges from point sources into the waters, including compliance schedules.[17]

Under this new system, discharges of pollutants are unlawful except in compliance with various provisions of the statute, including the provision regarding permits which will incorporate effluent limitations.[18] The new Act further provides that such limitations must require use of the "best practicable" control technology by July 1, 1977,[19] and the "best available" technology by July 1, 1983.[20] New point sources, in specified categories[21] must meet a standard of performance reflecting "the greatest degree of effluent reduction which the [E.P.A.] Administrator determines to be achievable through application of the best available demonstrated control technology * * *."[22]

In order to achieve compliance with effluent limitations, Section 402 of the 1972 Amendments[23] establishes a "National Pollutant Discharge Elimination

[17] *Id.* Section 502(11), 33 U.S.C. (Supp. III) 1362(11). The term "schedule of compliance" means "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." *Id.* Section 502(17), 33 U.S.C. (Supp. III) 1362(17).

[18] *Id.* Section 301(a), 33 U.S.C. (Supp. III) 1311(a).

[19] *Id.* Section 301(b)(1)(A), 33 U.S.C. (Supp. III) 1311(b)(1)(A).

[20] *Id.* Section 301(b)(2)(A), 33 U.S.C. (Supp. III) 1311(b)(2)(A).

[21] *Id.* Section 306(b)(1)(A), 33 U.S.C. (Supp. III) 1316(b)(1)(A).

[22] *Id.* Section 306(a)(1), 33 U.S.C. (Supp. III) 1316(a)(1).

[23] *Id.* Section 402, 33 U.S.C. (Supp. III) 1342; see also *id.* Section 405, 33 U.S.C. (Supp. III) 1345.

System (NPDES)," which authorizes the E.P.A. to issue permits to all point source discharges covered by the revised Act. In accordance with comprehensive regulations,[24] E.P.A. has been administering the NPDES and has issued more than 33,000 permits. Such permits to discharge must contain a schedule of compliance and are issued on condition that effluent limitations will be met.[25] Each permit is for a fixed term not to exceed five years [26] and, during the term, may be terminated or modified for a violation of the permit conditions, for misrepresentations, or if a change in conditions "requires either a temporary or permanent reduction or elimination of the permitted discharge." [27]

While the 1972 Amendments retained the basic policy that controlling water pollution is the primary responsibility of the states,[28] Congress provided that the states will be allowed to issue permits under the revised Act in place of the E.P.A. only if certain conditions are met. Each state "desiring to administer its own permit program" may submit to the E.P.A. its proposed program.[29] A state may not issue permits unless its permit program has been approved by

[24] 40 C.F.R. Part 125.

[25] FWPCA Amendments of 1972, Sections 301, 302, 306, 307, 33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317; 40 C.F.R. 125.23, 125.24.

[26] 40 C.F.R. 125.25.

[27] 40 C.F.R. 125.22(a)(2).

[28] *Id.* Section 101(b), 33 U.S.C. (Supp. III) 1251(b).

[29] *Id.* Section 402(b), 33 U.S.C. (Supp. III) 1342(b).

E.P.A.[30] Each state's permit program must contain the elements listed in Section 402(b), and, in addition, it must comply with the guidelines established under Section 304(h). E.P.A. retains the power to review a state's implementation of its permit program. The state must transmit to the Agency copies of proposed permits; and a permit proposed by a state cannot be issued if the Administrator determines that it does not conform to the guidelines and requirements of the Act.[31]

In order to implement the provisions in Section 402 regarding state permit programs under the NPDES, the Administrator of E.P.A. has promulgated extensive regulations governing the elements that must be present in a state program.[32] Section 124.2(b) of the regulations (40 C.F.R. 124.2(b)) provides that upon approval of the state program, "the Administrator shall suspend his issuance of NPDES permits as to those point sources subject to such approved program." Under Section 125.2(b) of the regulations (40 C.F.R. 125.2(b)) such approved state programs "do not cover agencies and instrumentalities of the Federal Government * * *."

[30] *Ibid.* As of June 23, 1975, twenty-four states had received approval from the Agency to administer their own permit programs. Those states are California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Carolina, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

[31] *Id.* Section 402(d), 33 U.S.C. (Supp. III) 1342(d).

[32] 40 C.F.R. 124.1–124.94.

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Thus, E.P.A. has not delegated to the states with approved permit programs the authority to extend those programs to federal facilities. The Agency itself continues to issue discharge permits to those facilities. Within the states comprising the Ninth Circuit, E.P.A. had issued (as of March 31, 1975) 187 NPDES permits to federal facilities. At least forty other federal facilities have permit applications pending in various processing stages [33] where E.P.A. has issued written draft permits, public notices or held public hearings.[34] These federal facilities include, for example, various military installations, National Parks, National Aeronautics and Space Administration (NASA) installations and Veterans Administration hospitals.

B. THE PROCEEDINGS BELOW

In August 1973, the State of California, by and through its Water Resources Control Board, and the State of Washington filed in the Court of Appeals for the Ninth Circuit petitions for review under Section 509(b)(1)(D) of the 1972 Amendments (33 U.S.C. (Supp. III) 1369(b)(1)(D))[35] against the E.P.A. and its Administrator (App. 12–17, 21–28).

[33] E.P.A. estimates at least a six-month time lapse between the receipt of an application and the issuance of a permit.

[34] Under Sections 402(a)(1) and 402(b)(3) of the FWPCA Amendments of 1972, 33 U.S.C. (Supp. III) 1342(a)(1) and (b)(3), the opportunity for public hearing must be afforded before the issuance of a permit.

[35] Section 509(b)(1)(D) provides that the courts of appeals may review the Administrator's action "in making any determination as to a State permit program submitted under section 402(b)."

California alleged that its Governor had submitted to E.P.A. on February 15, 1973, and April 10, 1973, a permit program "which the State proposed to operate within its jurisdiction as part of the NPDES" (App. 15). The E.P.A. approved California's program,[36] by letter dated May 14, 1973, and informed the state's Governor that E.P.A. was suspending the issuance of permits "under Subsection (2) of Section 402 of the Act as to all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government" (*id.* at 18). The E.P.A.'s refusal to allow the state to apply its permit program to federal facilities, California charged, violated Sections 402 and 313 of the Act (*id.* at 16).

The State of Washington made a similar contention in its petition for review, which alleged that the E.P.A.'s Regional Administrator advised the state on June 12, 1973, that E.P.A. would not "delegate permit issuance for federal facilities to any state" (App. 25). On July 20, 1973, the E.P.A. Regional Administrator rejected State's proposed permit program because it was "missing important components" and, on the same day, advised the State's Department of Ecology that E.P.A. had "sole authority to issue permits to federal facilities" (*ibid.*). Upon the State's resubmission of its program, the Administrator of the E.P.A., on November 14, 1973, approved the program and advised the State that E.P.A. was suspending its issuance of NPDES permits except with respect to federal facilities (*id.* at 29).

[36] California was the first state to receive approval of a state permit program (App. 18).

The court of appeals held that "the 1972 amendments to the Federal Water Pollution Control Act clearly mandate a federal agency duty of full compliance with all aspects of state permit programs" (Pet. App. 28a). Therefore, the court declared invalid 40 C.F.R. 125.2(b), insofar as that provision exempted federal facilities from State permit procedures, and directed the Administrator to reconsider the disapproved portions of the permit programs submitted by California and Washington and to act expeditiously in a manner consistent with its opinion (Pet. App. 29a). In so holding, the court noted that the language of Section 313, which is central to these cases, is virtually identical to the language of Section 118 of the Clean Air Act, as amended, 42 U.S.C. 1857f (Pet. App. 23a–24a), and explicitly recognized that the Fifth and Sixth Circuits had arrived at conflicting interpretations of Section 118 of the Clean Air Act (Pet. App. 24a).[37]

SUMMARY OF ARGUMENT

I

Section 313 of the Federal Water Pollution Control Act Amendments of 1972 directs federal agencies and facilities to "comply with * * * State * * * and

[37] *Alabama* v. *Seeber*, 502 F. 2d 1238 (C.A. 5), petition for certiorari pending, No. 74–851 (holding that federal facilities are subject to state permit procedures); *Kentucky ex rel. Hancock* v. *Ruckelshaus*, 497 F. 2d 1172 (C.A. 6), certiorari granted *sub nom. Kentucky ex rel. Hancock* v. *Train*, March 17, 1975, No. 74–220 (holding that federal facilities are not subject to state permit procedures).

local requirements respecting control and abatement of pollution * * *."

Standing alone, Section 313 and its key word, "requirements," fail to provide a definitive answer to the question regarding the nature and scope of the waiver of federal immunity from state regulation intended by Congress when it adopted that provision. Petitioners maintain that the waiver does not extend beyond federal compliance with state effluent standards and limitations, including compliance schedules. California and Washington, on the other hand, contend that the waiver extends beyond such state substantive standards to state administrative procedures involving state effluent discharge permits.

Resolution of this dispute must take account of the Supremacy Clause and the Plenary Powers Clause of the Constitution, the effect of which is that the states cannot regulate the federal government, its agencies, or its activities, nor can they extend their regulations to federal enclaves. Congress can affirmatively waive federal immunity from state regulation but in view of this traditional and constitutional division of powers between the federal government and the states, any such congressional waiver must be clear, unambiguous and unequivocal.

Thus, Section 313 can subject federal facilities to state regulation through a state permit program only insofar as Congress has actually considered the matter and decided that the states should have such regulatory authority over the activities of the federal government.

II

Section 313 of the FWPCA is derived from Section 118 of the Clean Air Act and the surest guide to the meaning of "requirements" in Section 313 is that the same term, as used in the corresponding section of the Clean Air Act, does not comprehend state permit procedures.

Contrary to the court below, there is no reason to read the two Acts differently. The court erred in stating that Section 510 of the FWPCA has no Clean Air Act counterpart—Section 116 of the latter Act is virtually identical to Section 510. Neither provision aids in deciding the meaning of "requirements" as used in Section 313 (or Section 118 of the Clean Air Act) since the same term in Section 510 refers to something other than state standards or limitations yet all agree that "requirements" under Section 313 include at least this.

Also, the fact that Section 313 refers to federal facilities paying reasonable service charges, while Section 118 of the Clean Air Act does not, cannot serve to distinguish the statutes and does not lead to the conclusion that "requirements" include state permit procedures. The reference to reasonable service charges means only that federal facilities must pay their fair share of the cost of sewer service and sewerage treatment.

Moreover, Section 306(c) exempts new federal facilities from state enforcement of standards, and Section 308(c) denies the states the power to inspect, monitor, or enter federal point sources. Thus, even if states could issue permits to federal facilities, Con-

gress did not give them the power to make those permits effective. Section 402(b) allows the states to administer their own permit program upon the determination of the E.P.A. Administrator that the state's program meets the conditions set forth therein. Yet two of those conditions are that the state program include the powers specifically denied to the states with respect to federal facilities by Sections 306(c) and 308(c). Hence, the Act itself bars the states from devising acceptable permit programs to apply to federal facilities.

As to Section 505(f), this is the Act's mechanism available to states (and to other parties) for the purpose, *inter alia,* of judicially enforcing the federal facility compliance provision. That section lists certain provisions of the FWPCA, with respect to some of which federal installations must comply, but it does not furnish a clear definition of the meaning of "requirements" in Section 313.

Among the provisions enumerated in Section 505(f) is the state certification requirement, which is established by Section 401 as a prerequisite to federal permitting of a discharge source. However, by Section 401(a)(6) federal facilities are exempt from the state certification procedure, thus underscoring the congressional intent that the federal government should not be subject to state administrative procedures.

III

Examination of the legislative history of Section 313 reveals no congressional intent to subject federal agencies and facilities to state permitting authority.

With respect to Section 313, the Senate, the House, and the Conference Committee stated only that federal facilities were to comply with state substantive abatement standards and limitations. However, neither the committees nor any individual member of Congress demonstrated any intent at any time to extend federal compliance beyond that point. There is, in short, nothing to suggest that Congress ever contemplated that federal facilities would be required to comply with state permit procedures and all indications are that "requirements" in Section 313 meant only state standards and limitations.

IV

Finally, the interpretation applied to Section 313 by the E.P.A., the agency charged with administering the FWPCA, has not extended state permitting authority to federal installations. That agency interpretation should be given substantial weight in determining the meaning of the federal facilities provision and should not be rejected unless there are compelling reasons why it is wrong. Such reasons are wholly absent here.

ARGUMENT

SECTION 313 OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED IN 1972, DOES NOT REQUIRE FEDERAL FACILITIES TO SEEK AND OBTAIN STATE DISCHARGE PERMITS IN ORDER TO OPERATE WITHIN THE STATE

I

INTRODUCTION

The dispute in this case concerns the meaning of the first sentence of Section 313 of the Federal Water Pollution Control Act, as amended in 1972, 33 U.S.C. (Supp. III) 1323,[38] which provides that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local *requirements* respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. [Emphasis supplied.]

Respondents argue that the language in Section 313's first sentence—"shall comply with * * * State, * * * and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements"—means that facilities of the executive, legislative and judicial branches of the federal government must comply not only with state effluent limitations and compliance schedules, but also with state regulations demanding that sources of discharges—including federal facilities—obtain discharge permits.

[38] Section 313 is set out in full at pp. 2–3, *supra*.

We contend, however, that the phrase means only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its E.P.A.-approved implementation plan.[39]

Underlying this controversy regarding the proper interpretation of Section 313 of the Act are principles of federalism derived in part from the Supremacy Clause and the Plenary Powers Clause of the Constitution.[40] As the court below recognized, the Supremacy Clause bars state regulation of the federal government and its activities and the Plenary Powers Clause prohibits the extension of state regulatory power into areas of exclusive federal legislative jurisdiction (Pet. App. 10a).

Federal-state relationships have, from the beginning, been governed by these principles,[41] the

[39] See Section 303(e), 33 U.S.C. (Supp. III) 1313(e).

[40] The Supremacy Clause (Art. VI, cl. 2) reads as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In pertinent part, the Plenary Powers Clause (Art. I, Sec. 8, cl. 17) reads as follows:

> The Congress shall have Power * * * [t]o exercise exclusive Legislat[ive] * * * Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *

[41] In regard to the Supremacy Clause, the leading case is, of course, *McCulloch* v. *Maryland*, 4 Wheat. 316. See also, *e.g.*, *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Ohio* v. *Thomas*, 173 U.S. 276; *Johnson* v. *Maryland*, 254 U.S. 51; *Hunt* v. *United States*, 278 US. 96; *Arizona* v. *California*, 283 U.S. 423; *Mayo* v. *United States*, 319 U.S. 441; *California Commission* v. *United States*, 355 U.S. 534; *United States* v. *Georgia Pub. Serv. Commission*, 371 U.S. 285. Neither the purpose of the state law or regulation nor its importance to the state alters the effect of the Supremacy Clause. See *Free* v. *Bland*, 369 U.S. 663, 666.

The case law relating to the Plenary Powers Clause predates *McCulloch* v. *Maryland*, *supra*, by at least eight years. The Supreme Judicial Court of Massachusetts held that the Plenary Powers Clause prohibited state regulation of liquor sales in the federal small arms factory at Springfield. *Commonwealth* v. *Clary*, 8 Mass. 72.

During the years since *Clary*, state efforts to intrude upon the domain which the Plenary Powers Clause entrusts exclusively to Congress have been consistently rejected. See, *e.g.*, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369; *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518; *Standard Oil Co.* v. *California*, 291 U.S. 242; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 533; cf. *Paul* v. *United States*, 371 U.S. 245.

[42] See *The Federalist* Nos. 43 and 44 (1961) (Madison).

[43] Beard, *The Enduring Federalist* (1959) p. 187.

underlying purpose of which is to avoid even the potential for state interference with the lawful functions of the federal government.[42] As James Madison stated in *The Federalist* No. 43,[43] "The public money expended on [federal installations], and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it."

These considerations are no less valid today than they were two centuries ago when the Founders em-

bodied them in the Constitution. To be sure, Congress can decide to modify the normal federal-state relationship by affirmatively granting to the states the power to control certain federal activities.[44] But in light of the firmly-established constitutional principles discussed above, the Court has not readily assumed that Congress decided to waive traditional federal immunity from state control. Instead, the congressional waiver must be clear and unambiguous and it must be unequivocal.[45]

It is in light of this considerable background of constitutional law that we approach the question of the proper interpretation of Section 313 of the Federal Water Pollution Control Act.

II.

WHEN READ IN LIGHT OF THE STATUTE AS A WHOLE, THE LANGUAGE OF SECTION 313 DIRECTING FEDERAL FACILITIES TO COMPLY WITH STATE WATER POLLUTION "REQUIREMENTS" MEANS ONLY THAT SUCH FACILITIES MUST MEET STATE STANDARDS AND LIMITATIONS, INCLUDING COMPLIANCE SCHEDULES

On its face, Section 313 does not reveal a clear, unambiguous, unequivocal congressional waiver of the authority of the federal government to conduct activities inside a state without its permission, given in the

[44] See in regard to waiver of the Supremacy Clause, *Mayo* v. *United States*, 319 U.S. 441, 448; and in regard to the Plenary Powers Clause, *Paul* v. *United States*, 371 U.S. 245; *United States* v. *Sharpnack*, 355 U.S. 286; *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558.

[45] See, *e.g.*, cases cited in note 44, *supra;* see also *United States* v. *Sherwood*, 312 U.S. 584, 590; *United States* v. *King*, 395 U.S. 1, 4.

form of a permit. The pertinent phrase in Section 313 provides that federal facilities must "comply with * * * State, * * * and local requirements respecting control and abatement of pollution" and the single word, which is the key to the meaning of Section 313 and at the center of this case, is "requirements."

While federal facilities must comply with state requirements, Section 313 itself is of little assistance in determining what is meant by "requirements." The language following the quoted phrase—"to the same extent that any person is subject to such requirements"—does not advance the inquiry: it explains only to what extent federal facilities must comply with applicable state provisions but does not say which state provisions are applicable.

Without looking further, however, we do know that Section 313 of the FWPCA Amendments is derived from[46] and virtually identical to Section 118 of the Clean Air Act, as amended in 1970,[47] and that the operative language just quoted is the same as that in the Clean Air Act provision, save for the FWPCA's deletion of the word "air" preceding the term "pollution." Since there is no indication that the two statutes were intended to mean something different in regard to state authority over federal facilities, the most certain guide to the meaning of Section 313 of the FWPCA Amendments is that its earlier counterpart in the Clean Air Act does not direct federal facilities to obtain state air pollution permits, as we have

[46] See p. 34, *infra.*

[47] 42 U.S.C. 1857f.

argued in our brief in *Kentucky ex rel. Hancock* v. *Train,* No. 74–220, certiorari granted March 17, 1975.

The court of appeals in this case, however, believed that the two statutes could properly be subject to conflicting interpretations because the first sentence of Section 313 of the FWPCA Amendments ends by stating that "requirements" include "the payment of reasonable service charges," while Section 118 of the Clean Air Act contains no comparable language; and because Sections 510[48] and 402[49] of the FWPCA Amendments have no Clean Air Act counterparts (Pet. App. 24a–25a).

With respect to Section 510, the court's statement is not accurate. Section 510 of the FWPCA Amendments not only has a counterpart in the Clean Air Act, it was copied directly from Section 116 of that Act. This is unmistakable when the language of Section 116[50] is compared with that of Section 510:[51] the

[48] 33 U.S.C. (Supp. III) 1370.

[49] 33 U.S.C. (Supp. III) 1342.

[50] Section 116 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857d–1, reads as follows:

> Except as otherwise provided in sections 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[51] See Appendix, *infra*, for the full text of Section 510.

references to the states' right to set a more restrictive (1) "standard or limitation" or (2) "requirement respecting control or abatement of pollution" are common to both statutes. Moreover, contrary to the court below,[52] the Section 510 phrase containing the word "requirement" does not give content to the meaning of the same word in Section 313. As used in Section 510, the term refers to something distinct from a "standard or limitation respecting discharges of pollutants," yet the one area of agreement between the parties here is that the same word—"requirements"—as used in Section 313 does comprehend such standards or limitations.[53] To view the matter otherwise by looking to Section 510 in order to define Section 313 would lead to the untenable result that federal facilities must comply with state permit procedures but not with state substantive standards or limitations respecting the discharge of pollutants.

While the court of appeals thus erred in stating that Section 510 had no Clean Air Act counterpart and in relying on that provision, the court did correctly point out that no clause in Section 118 of the Clean Air Act corresponds to the "reasonable service charges" clause in Section 313 of the FWPCA Amendments. The court of appeals read that language to mean "charges incident to state permit programs," a reading that supported the court's view that

[52] Pet. App. 21a–22a.

[53] We made the same point in our Brief (at pp. 20–21) in *Kentucky ex rel. Hancock* v. *Train*, *supra*, with respect to Section 116 of the Clean Air Act.

under Section 313 federal facilities must obtain state permits (Pet. App. 16a). There is, however, no basis for that interpretation of the clause in either the FWPCA or its legislative history—unless one first assumes the court of appeals' ultimate conclusion on the issue of this case.

The most apparent explanation why the reasonable service charge clause does not appear in the Clean Air Act lies in the fact that the Air and Water Acts deal with two different elements of the environment. Sewer systems carry the effluent discharges associated with water, and for that service and for the treatment of such wastes (in sewerage treatment plants) a charge is levied upon the user for the service received. There is no equivalent waste discharge collection technology for air emissions and, therefore, no equivalent services for which charges can be levied.

While it might have been unnecessary for Congress to direct federal facilities to pay their share of municipal sewer system costs (Pet. App. 17a), Congress may well have believed that those facilities should pay *only* their fair share of such costs. This much is at least indicated by the inclusion of the word "reasonable" in the clause: what Congress appears to have done is to *protect* specifically federal agencies and facilities against any possibility that state or local governments might attempt, in effect, to extract from the national treasury an unauthorized subsidy by levying upon federal installations a disproportionately high service charge. And in this regard Congress' action is, of course, entirely consistent with the purposes

of the Supremacy Clause and the Plenary Powers Clause of the Constitution and the traditional federal-state relationship reflected therein (see pp. 18–20, *supra*).

We turn now to Section 402, the third provision relied upon by the court of appeals. As we discuss below, analysis of Section 402, far from supporting the court's interpretation of "requirements" in Section 313, leads to the conclusion that federal facilities are not subject to state permit programs.

Section 402(b) sets out nine criteria that a proposed state permit program must meet in order for the Administrator to approve it and to delegate his permitting authority to the state.[54] Congress made those criteria essential to any state permit program, so essential that according to the language of the statute, the E.P.A. Administrator cannot approve a program from which *any* of the elements is missing.

The first criterion, Section 402(b)(1)(A), provides in pertinent part (emphasis added):

> The Administrator shall approve each such submitted program *unless* he determines that adequate authority does not exist:

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[54] Basically, they are the same elements Congress included in the federal permit program (prior to a delegation of authority to the States). See Section 402(a), 33 U.S.C. (Supp. III) 1342(a).

Use of the conjunctive "and", tying subsection (b)(9) to its eight predecessors, makes it clear that Congress did not intend the nine criteria as options among which the states or the Administrator could choose, but that each and every one must be included in any state program before it could be approved by the Administrator.

> (1) To issue permits which—(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, *306*, 307, and 403; * * *

Section 306 (33 U.S.C. (Supp. III) 1316) deals with the establishment of standards of performance for new sources. Under Section 306(b)(3), those standards apply to new sources owned or operated by the United States. However, Section 306(c) reads as follows:

> Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (*except with respect to new sources owned or operated by the United States*). [Emphasis supplied.]

Thus, in its proposed Section 402 permit program a state must be able to apply and enforce Section 306 standards if that program is to be approved *and* if that program is to be effective, but the state's procedures for applying and enforcing those standards are not to be employed against federal facilities.[55] On the other hand, federal facilities must comply with Section 306 standards; that is one of the two sets of

[55] The court of appeals recognized the federal facility exemptions in Sections 306(c) and 308(c) (*infra*), but did not attempt to determine the effect of those exemptions upon other provisions in the Act (Pet. App. 23a and n. 16).

standards (Section 307 being the other) from which not even the President can exempt them, according to Section 313. This interrelationship of provisions leads to the quite firm conclusion that enforcement of federal compliance with Section 306 must be accomplished by some means other than state permits.[56]

The second prerequisite to E.P.A. approval of a state permit program is contained in Section 402(b)(2)(B), which reads as follows (emphasis supplied):

> The Administrator shall approve each such submitted program *unless* he determines that adequate authority does not exist:
>
> * * * * *
>
> To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act; * * *

Congress thus recognized that essential to the application and enforcement of any pollutant discharge abatement program are the inspection, entry, and monitoring of sources in order to insure compliance with abatement standards. A state must be able to monitor, inspect, and enter sources subject to its permits or the permit program cannot be approved by the Administrator.

However, the relevant provision—Section 308—flatly denies the states the power to inspect, monitor,

[56] For an explanation of the means by which Federal compliance with Section 306 can be assured by the states, see discussion of Section 505, 33 U.S.C. (Supp. III) 1365, *infra*, at pp. 29 to 32.

Section 306 is unique in that, when it is violated, suit can be brought under Section 505(a) without the sixty-day notice required by Section 505(b).

and enter federally owned or operated point sources. Section 308(c), 33 U.S.C. (Supp. III) 1318(c), provides:

> If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (*except with respect to point sources owned or operated by the United States*). [Emphasis supplied.]

Again, as with the relationship between Sections 402(b)(1)(A) and 306(c), Congress has specifically identified certain functions as essential to the implementation of an effective state permit program, indeed so essential that without them a state's program cannot be approved—and yet has specifically denied the states the power to carry out precisely those essential functions with respect to federal facilities. The logical conclusion, once again, is that the permitting authority Congress chose to make available to the states did not extend to federal facilities.

Indeed, the effect of the court of appeals' holding is to amend the FWPCA by reading out of existence the congressional directions in Section 306(c) and 308(c). Only by such judicial revision could the E.P.A. Administrator circumvent those provisions and approve the Washington and California permit programs pursuant to Section 402(b) insofar as the states' programs apply to federal facilities. In sum,

within the context of the FWPCA, Section 402(b) not only fails to support the court of appeals' conclusion, but is squarely against it.[57]

Section 505, 33 U.S.C. (Supp. III) 1365, is the only other provision to which the court devoted any significant attention.[58] However, that section affords little, if any, support to the court of appeals' position.

Section 505 is a rather complex multi-functional provision. It is the only jurisdictional provision within the Act for civil suits under the Act; it is the sole waiver of federal immunity[59] from suit for civil

[57] The court of appeals itself acknowledged the weakness of its own decision in the absence of those supporting bases heretofore discussed:

> Considered in the light of Sections 402 and 510, other sections in the Act afford added support to petitioners' interpretation of the term "requirements" in Section 313, *though the significance of each would have been less certain apart from these two sections.* [Pet. App. 22a–23a; emphasis supplied.]

[58] Section 505(a) establishes jurisdiction in federal courts, limits that jurisdiction to civil actions, eliminates the requirements of a minimal amount in controversy and diversity of citizenship, and defines standing for such an action.

The jurisdiction conferred by Section 505(a) is conditioned specifically upon compliance with the sixty-day notice of suit prerequisite established in Section 505(b).

Under Section 509(b), 33 U.S.C. (Supp. III), 1369(b), certain specific actions of the Administrator can be reviewed exclusively in the appropriate court of appeals on petition. The instant case focuses upon one of the types of action identified in Section 509(b) for such treatment. Another is a challenge to an individual permit. Section 509(b)(1)(F).

[59] That waiver is limited to actions against the federal government or its agencies for violations of an effluent standard or limitation (Section 505(a)(1)) and actions against the E.P.A. Administrator for failure to perform non-discretionary functions under the Act (Section 505(a)(2)).

relief within the Act;[60] and it is the enforcement provision designed to be used by the states to insure compliance with Section 313, *inter alia*.[61]

Section 505(f) refers, in a parenthetic clause, to Section 313, but this only supports petitioners' position

[60] From the fact that by California law some substantive limitations may be set following administrative hearings in which a discharger may participate, the court of appeals inferred a federal susceptibility to state administrative procedures under the predecessor to Section 313, and it used that inference as guidance in reaching its decision. (Pet. App. 9a.)

The weakness of that approach lies with the fact that there is a marked contrast between participation in hearings and a state permit. The latter is an instrument which may be issued or withheld, thereby giving the states actual control over the operations of the federal government.

As to how a state will establish those standards with which federal facilities must comply, Section 313 is silent; it assures only federal compliance with state standards. It is not a guarantee that the states will not have to modify their administrative practices in order to accommodate the legal characteristics of the federal government, its agencies, and its instrumentalities.

However, federal agencies must cooperate with the states with respect to compliance. Executive Order 11752, Section 3 (a)(2), 38 Fed. Reg. 34793, 34794. Hence, they are required to provide states with whatever data are needed for standard setting.

[61] The enforcement mechanism of Section 505(a) is available to the states because a "State" is a "person" (Section 502(5), 33 U.S.C. (Supp. III) 1362(5)), a "person" is a "citizen" (Section 505(g), 33 U.S.C. (Supp. III) 1365(g)), and a citizen can bring suit under Section 505(a).

By providing states with this enforcement procedure through Section 505, Congress has eliminated what would otherwise appear to be a loophole left because the Act does not extend state permitting authority to federal facilities. By Section 313, as well as by Executive Order 11752, *supra*, federal facilities are required to meet applicable substantive standards and limi-

regarding the enforcement function of Section 505. Borrowed directly from Section 304(f) of the Clean Air Act, as amended,[62] the federal facilities compliance reference in Section 505(f) comes at the end of a list

tations. Hence, it would be redundant to impose upon them those same requirements under the authority of a state permit. If a federal installation fails to meet the relevant standards or limitations, it is not a state permit which the state can enforce to secure compliance, but rather the federal law through civil suit.

That Section 505 was intended to be the states' enforcement mechanism for federal facility compliance with Section 313 is made abundantly clear by the legislative history concerning the corresponding provisions in the Clean Air Act, Sections 118 and 304, 42 U.S.C. 1857f and 1857h–2, respectively, as we pointed out in our Brief (at pp. 24–26) in *Kentucky ex rel. Hancock* v. *Train*, *supra*.

The Clean Air Act's legislative history is quite relevant to the FWPCA with respect to the "citizen suit" provision, since Section 505 of the FWPCA is modeled upon Section 304 of the Clean Air Act. S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 *Legis. Hist.* 1497.

[62] Section 304(f) of the Clean Air Act, 42 U.S.C. 1857h-2(f), reads as follows:

> (f) For purposes of this section, the term "emission standard or limitation under this Act" means—
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive,
>
> which is in effect under this Act (*including a requirement applicable by reason of section 118*) or under an applicable implementation plan. [Emphasis supplied.]

A comparison of the Clean Air Act's Section 304(f) with the FWPCA's Section 505(f) (see Appendix, *infra*) undercuts the court of appeals' contention that the Water Act provision is in any way substantially different in form or effect from its Air Act counterpart (Pet. App. 25a).

of six categories of provisions[63] (the last of which is permits) that may be enforced by a Section 505 suit. However, this cannot be read to mean that all six of the enumerated categories are to be considered "requirements" under Section 313. As we discuss below, category (5) refers to certificates under Section 401 (33 U.S.C. (Supp. III) 1341), and federal facilities are expressly exempted from having to obtain such certificates. (Section 401(a).) Thus, Section 505(f) gives no guidance in regard to which of the listed provisions are "requirements" under Section 313. To determine this, other sections of the Act must be consulted, as we have done above.

As to Section 401 itself, this provides that before any "applicant" for a federal permit from E.P.A. under Section 402 can operate a facility, the applicant must first obtain from the state in which the discharge will originate a certificate that such discharge will comply with the effluent limitations and standards pursuant to Sections 301, 302, 306 and 307.[64]

[63] Section 505(f) provides in full:

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

[64] 33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317.

However, Congress expressly provided that no federal agency "shall be deemed to be an applicant for the purposes of" Section 401(a); in short, unlike other pollutant sources, federal facilities are not to be subject to state certification procedures, compliance with which would otherwise be a prerequisite for a federal permit or license. See Section 401(a)(6), 33 U.S.C. (Supp. III) 1341(a)(6).

The specific exemption for federal facilities in Section 401(a) is still further support for our reading of Section 313: when Congress had the opportunity to subject federal facilities to state control (by the state's withholding a certificate) it followed the traditional course reflected in the Supremacy Clause. Since state certification is so analogous to a state permit, there is we submit no reasonable explanation why Congress would have subjected federal facilities to state permit procedures and yet exempted such facilities from state certification procedures.

III.

THE LEGISLATIVE HISTORY OF SECTION 313 CONFIRMS THAT CONGRESS DID NOT INTEND TO ALTER THE TRADITIONAL FEDERAL-STATE RELATIONSHIP BY REQUIRING FEDERAL FACILITIES TO OBTAIN STATE DISCHARGE PERMITS

If there is any remaining uncertainty about the proper interpretation of Section 313, this is removed upon examination of the legislative history of that provision. In regard to this evidence, the focus must again be on the word "requirements" contained in the first sentence of Section 313. The language of the

first sentence in both Section 313 of Senator Muskie's original Senate Bill, S. 2770, and in the original House version of the bill, H.R. 11896, is nearly identical with the language of that section ultimately enacted into law. 2 *Legis. Hist.* 1676–1677; 1 *Legis. Hist.* 1040–1041.

In the Report of the Senate Committee on Public Works accompanying S. 2770, the most pertinent paragraphs in the brief discussion of Section 313 read as follows:[65]

> This section, similar to one in existing law, requires that Federal facilities meet the same *effluent limitations* as private sources of pollution, unless the Federal facility is specifically exempted by the President. The President cannot exempt any source from requirements of Sections 306 and 307.
>
> This section would require every Federal agency with control over any activity or real property, to provide national leadership in the *control* of water pollution in such operations.
>
> * * * Lack of Federal leadership has been detrimental to the *water pollution control effort.* The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.

The House Committee on Public Works Report on H.R. 11896 also described the nature of the compliance demanded of federal facilities under Section 313:[66]

> This section requires that Federal facilities meet the same *effluent limitations,* other *limitations, performance standards, toxic effluent standards* and thermal discharge *regulations* as private sources of pollution, unless the Federal facility is specifically exempted by the President. The President cannot exempt any source from the requirements of sections 306 and 307.[67]

The words and phrases used by the Committees—"effluent limitations," "limitations," "performance standards," and "effluent standards"—certainly do not refer to, and do not suggest, an intention to submit federal facilities to state permit procedures; rather, all point to federal compliance with applicable substantive pollution abatement requirements. Indeed, both Reports first describe the "requirements" of Section 313 as "effluent limitations," which are dealt with in Section 301 of S. 2770 and H.R. 11896,[68] and of the Act, 33 U.S.C. (Supp. III) 1311 ("Effluent Limitations"). From original bill through final Act, Section

[65] S. Rep. No. 92–414, 92d Cong., 1st Sess. 67 (1971); 2 *Legis. Hist.* 1485 (emphasis added).

[66] H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 118 (1972); 1 *Legis. Hist.* 805 (emphasis added).

[67] During the House debate on the bill, Representative Jones, a member of the House Commitee, described section 313 as follows (1 *Legis. Hist.* 361): "Requires Federal facilities to meet the same *effluent limitations* and *water quality* standards as private sources of pollution unless the facility is specifically exempted by the President." [Emphasis supplied.]

[68] S. 2770, 92d Cong., 1st Sess. 75 (1971); H.R. 11896, 92d Cong., 2d Sess. 266 (1971); 2 *Legis. Hist.* 1608; 1 *Legis. Hist.* 962.

301 has been devoted entirely to the actual elimination of the physical discharge of pollutants into the water; it does not speak at all of administrative permit procedures.[69]

Similarly, in varying contexts, the word "standard" is found in several sections of the bills and of the FWPCA. Section 303 of H.R. 11896 and of the Act, 33 U.S.C. (Supp. III) 1313, addressed "Water Quality Standards and Implementation Plans," [70] and Section 307, 33 U.S.C. (Supp. III) 1317, relates to "Toxic and Pretreatment Effluent Standards." Each of those sections discusses "standards" in the sense of numerical measurements. Furthermore, Section 306(a)(1), 33 U.S.C. (Supp. III) 1316(a)(1) ("National Standards of Performance") defines a "standard of performance" (or "performance standard," as used in the House Report) as a "standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction * * * achievable through application of the best available demonstrated control technology * * *." Again, the subject of the statutory provision is numerical measurements and the technological means of attaining those quantitative levels.

[69] Section 302, entitled "*Water Quality Related Effluent Limitations*" in the bills and in the FWPCA, also fails ever to suggest any extension of state administrative procedures to federal facilities. Its focus is upon the physical quality of water.

[70] Section 303 of S. 2770, dealing with "Aquaculture," corresponds to Section 318 of H.R. 11896 and of the final Act. In S. 2770 there was no section corresponding to Section 303 of the House bill and of the final FWPCA Amendments. 1 *Legis. Hist.* 305–307.

Thus, in each of the sections relating to the subject of "standards," the single fact most relevant to this discussion is that none involve the administrative procedures of a permit program.

The word "control" appears several times in the previously mentioned congressional material, and it appears again in the Senate Committee's explanation of the Presidential exemption provision of Section 313 [71] in relation to the term "requirement": [72]

> The Committee recognizes, however, that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution *control* within the time required.

Thus, the requirement from which a facility may be exempted in the control of its pollution, that is, the control of actual physical discharge; the relevant requirement is not a state's permit procedure.

Following the development of S. 2770 and H.R. 11896 in their respective Houses of Congress, a Joint Conference Committee was convened to consider the Senate and House versions. The Conference Report indicates that in regard to Section 313 there were no differences to be resolved: [73]

[71] S. Rep. No. 92–414, *supra*, at 68; 2 *Legis. Hist.* 1486 (emphasis added).

[72] This part of Section 313 provides in relevant part:

"* * * The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a *requirement* if he determines it to be in the paramount interest of the United States to do so * * *." [Emphasis supplied.]

[73] S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 135 (1972); 1 *Legis. Hist.* 318 (emphasis added).

Senate bill

Section 313 requires Federal facilities to meet the same *effluent limitations* as other sources of pollution, unless the facility is specifically exempted by the President. The President cannot exempt a Federal source from national performance standards or toxic and pretreatment standards.

House amendment

Section 313 requires Federal facilities to meet the same *requirements* as private sources of pollution unless specifically exempted by the President in essentially the same manner as the Senate bill.

Conference substitute

This section is *the same as* the Senate bill and the House amendment.

If, and the Conference Committee Report states, "effluent limitations" mean the same as "requirements," then under Section 313 federal facilities must meet such limitations. Neither the Conference Report nor the preceding congressional explanations of Section 313's meaning, however, give any indication that the section additionally commands compliance with state and local permit procedures.

The command of Section 313 is thus that federal facilities control their pollution; it is not that they must apply for and secure state or local permits. Section 313 orders federal facilities to do their share in the pollution abatement effort just as every citizen must, and this is conconant with the basic purpose of the FWPCA Amendments to clean up the nation's

waters. If Congress intended otherwise, if it sought to give the states control of federal facilities through state permit programs, it would be remarkable indeed that Congress never mentioned this.

What Congress did say is that federal facilities must comply with "effluent limitations," and that compliance with effluent limitations is "the same as" compliance with "requirements."[74] The language in Section 313 therefore cannot be read to mean that compliance with "requirements" means more than compliance with effluent limitations.[75]

IV.

THE ENVIRONMENTAL PROTECTION AGENCY, WHICH IS CHARGED WITH THE ADMINISTRATION OF THE ACT, HAS INTERPRETED SECTION 313 TO MEAN ONLY THAT FEDERAL FACILITIES MUST MEET STATE EFFLUENT LIMITATIONS AND THIS INTERPRETATION IS ENTITLED TO GREAT WEIGHT

Prior to the filing of respondents' petitions for review, E.P.A. promulgated comprehensive regulations to implement the FWPCA Amendments. Section 125.2(b) of the regulations (40 C.F.R. 125.2(b)) provides that state permit programs approved by the

[74] The court of appeals candidly admitted the weakness of its own position in the face of the legislative history alone:

> If taken in isolation, certain parts of the legislative history would seem to indicate that the "requirements" language of Section 313 refers simply and solely to substantive water quality standards. [Pet. App. 15a.]

[75] As the court of appeals noted, the terms "effluent limitations" or "effluent standard[s]" are used "in a very precise sense" in the major substantive abatement provisions of the Act (Pet. App. 23a). That precision cannot be ignored, however, when the legislative history of Section 313 is considered.

E.P.A. Administrator "do not cover agencies and instrumentalities of the Federal government * * *."

As in *Train* v. *Natural Resources Defense Council,* No. 73–1742, decided April 16, 1975, slip op. 25, this interpretation by E.P.A. of Section 313 is entitled to great weight; E.P.A. is "charged with the administration of the Act" and, we submit, its interpretation is not only reasonable, but also correct in light of the Act as a whole and the history surrounding it. The "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" [76] and here there are no such indications."[77]

Moreover, the Administrative Conference of the United States has spoken to the issue in this case and has recently recommended to the President, the Con-

[76] *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381, quoted with approval in *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 421. See also *Udall* v. *Tallman,* 380 U.S. 1, 16–18.

[77] Moreover, on December 17, 1973, the President issued Executive Order 11752, 38 Fed. Reg. 34793–34797, concerning the prevention, control and abatement of environmental pollution at federal facilities. After stating that the FWPCA and other statutes required federal facilities to comply with state substantive standards and limitations regarding pollution, the Executive Order—agreeing with the earlier interpretation of Section 313 by E.P.A.—made clear that in "light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control." *Id.* at 34793.

gress, and the Judicial Conference of the United States various procedures for ensuring compliance by federal facilities with environmental quality standards.[78] In the view of the Administrative Conference, the FWPCA, like the Clean Air Act, requires "agencies with control over federal facilities to comply with both federal and nonfederal pollution control standards." [79] Since according to the Administrative Conference even a decision by this Court in favor of respondents "will leave substantial procedural problems," the Conference has proposed amending the FWPCA (and the Clean Air Act) to vest the responsibility for developing procedures in a single federal agency which "should consider the use of emission control permits where they are not now employed." 40 Fed. Reg. at 27928.

In sum, in light of the wording of Section 313, the other provisions of the FWPCA Amendments of 1972, the legislative history of that section, the amendments as a whole, and the interpretation by E.P.A., we submit that federal facilities are not required by Section 313 to seek and obtain state discharge permits. If a contrary result is thought desirable, although the Administrative Conference has proposed otherwise, this is a matter for Congress.

[78] 40 Fed. Reg. 27925, 27928 (July 2, 1975).

[79] *Id.* at 27928.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 306 of the Federal Water Pollution Control Act, as added, 86 Stat. 854, 33 U.S.C. 1316, provides, in pertinent part:

> "(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:
>
> * * * * *
>
> "(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-

water quality environmental impact and energy requirements.

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

"(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

* * * * *

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 308 of the Act, as added, 86 Stat. 858, 33 U.S.C. 1318, provides, in pertinent part:

"(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

Section 402 of the Act, as added, 86 Stat. 880, 33 U.S.C. 1342, provides in pertinent part:

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of

the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

* * * * *

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this

section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Section 505 of the Act, as added, 86 Stat. 888, 33 U.S.C. (Supp. III) 1365, provides in pertinent part:

* * * * * *

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply

any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brough immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

* * * * *

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

Section 509(b) of the Act, as added, 86 Stat. 892, 33 U.S.C. (Supp. III) 1369(b), provides:

> (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Section 510 of the Act, as added, 86 Stat. 893, 33 U.S.C. (Supp. III) 1370, provides:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement or pollution, except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition,

pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

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IN THE

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OF THE

UNITED STATES

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BRIEF FOR THE RESPONDENTS STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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A state waste discharge permit program, operating as an approved part of the National Pollutant Discharge Elimination System of Section 402 of the Federal Water Pollution Control Act, applies to *all* who discharge pollutants from point sources into waters of the United States within a state, *including federal agencies* 7

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency, in approving programs submitted to him by the States of California and Washington for inclusion as a part of the National Pollutant Discharge Elimination System of Section 402 of the Federal Water Pollution Control Act

Amendments of 1972, erred in excluding federal agencies and instrumentalities from the coverage of the approved state programs.

SUMMARY OF ARGUMENT

I.

The Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCAA) established an ambitious, expensive, many pronged attack on water pollution in our country with an ultimate goal of eliminating all pollution of waters of the United States. At the heart of the Act's program for regulation and control of point source waste discharges (as distinguished from "non-point") is a national waste discharge permit system entitled the National Pollutant Discharge Elimination System (hereinafter NPDES). This new system contains within it a governmental decision making mechanism whereby pollution control requirements, not only in terms of required treatment of wastes to be discharged but in terms of the time for accomplishment of such treatment, are established for specific discharges.

Two fundamental objectives of the new Act, accomplished through the NPDES, are: (1) all discharges of pollutants from point sources to waters of the United States shall be the subject of a permit issued pursuant to a national waste discharge permit system; and (2) within each state there shall be

only one permit issuing entity operating under the national system, either the federal government or the state, preferably the latter.

II.

The United States Environmental Protection Agency (hereinafter E.P.A. or petitioners) contends that federal agencies which discharge wastes to waters of the United States are not required to obtain permits from states operating a permit program as a part of the NPDES. We believe this position is clearly contrary to both the objectives and express wording of the Federal Water Pollution Control Act.[1] Our position is based primarily on the language of Section 313 of the FWPCAA which mandates that every federal instrumentality shall comply with federal, state, and local "requirements respecting control and abatement of pollution to the same extent as any person * * *." Relying on the normal and usual meaning of these words, the permit requirements of the NPDES are "requirements respecting control and abatement of pollution" within the meaning of the words as used in Section 313. Therefore federal agencies, who propose to discharge pollutants, must meet NPDES requirements established by operation of a state program just as all other dischargers are required.

There are various indicators within the FWP-

[1]The full text of Sections 313 and 402 of the FWPCAA are set forth in Appendices A and B hereof.

CAA which provide clear roadsigns of support for our position. First we note that federal agencies or facilities were exempted from specific portions of the FWPCAA; thus a strong inference arises that, where no express exemption exists in a regulatory program of the Act, federal facilities were intended to be included. Further we note the powers of the President to exempt federal facilities from most of the pollution control and abatement requirements described in Section 313 if he determines it to be "in the paramount interest of the United States" to do so. This power provides a relief valve from permit conditions included in a state permit which threaten national interest considerations. Thirdly, the language of Section 313, which requires federal agencies to pay "reasonable service charges", was clearly included to insure that each federal agency is empowered to pay fees to a state for processing applications filed in a state administered NPDES program. And, finally, attention is directed to those portions of section 505—the "citizens suit" section—which sets forth the strongest roadsign of all by providing that a citizen may enforce a condition of a permit issued under section 402 "including a requirement applicable by reason of section 313 * * *."

Based on the aforementioned policy objectives, and the specific wording of the Federal Water Pollution Control Act, when taken as a whole, a clear and unambiguous Congressional direction is established that federal agencies are required to obtain an

NPDES permit from a state whenever they discharge wastes within a state which has a federally approved permit progam.

III.

In light of the clarity of the legislative intent derived from the FWPCAA itself, we contend it is inappropriate to initiate the digression into legislative history suggested by petitioners. However, even assuming the necessity of such an examination, that endeavor will be fruitless for the total historical record is completely blurry and inconclusive in terms of both the Federal Water Pollution Control Act and the Clean Air Act. As to the latter act, the historical background of that act is suspect as a source for developing the meaning the the FWPCAA for the simple reason that the two acts are different in significant respects. The most important difference is, of course, that only the FWPCAA contains a national waste discharge permit program.

IV.

In conclusion, we note the contention of the E.P.A. that the interpretation it has given to the NPDES through adoption of rules implementing the system is entitled to great weight and that its interpretation should be accepted by this court unless there are "compelling reasons why it is wrong."

Although it is not readily apparent from the

brief of the petitioner, we are in basic agreement with E.P.A.'s position as to the scope of coverage of dischargers by the NPDES. The E.P.A. has concluded by formally adopted regulation that the NPDES is generally applicable to federal agencies. With this conclusion we agree. The only dispute we have with the E.P.A. is its interpretation that if a state operates a NPDES program it applies to all discharges within a state but discharges from federal facilities. E.P.A. contends the latter discharges are solely under the permit issuing authority of the E.P.A. With this, we quarrel. Indeed, in the precise sense, that is the issue to be decided in this case. The dispute is not whether federal agencies must obtain NPDES permits. All parties agree that federal agencies are required to do so. The only dispute involves a narrow legal issue, i.e., when a state submits a permit program to E.P.A. which meets all of the criteria necessary for approval as a part of the NPDES, may the E.P.A. approve the state program for application to all discharges but those of federal agencies? We believe the words of section 402 clearly compel a negative answer.

The interpretation of E.P.A. that federal agencies are subject to the NPDES is, of course, in direct conflict with the analysis of section 313 taken in its brief. The brief states the requirement of section 313 which federal agencies must comply with are "substantive" requirements of state law only. Requirements characterized by E.P.A. as "procedural," including permit systems (such as the NPDES), are thus not requirements within section 313. If this analysis is sound (and we believe it is not), the Environmental Protection Agency erred in its formally adopted regulations when it included federal agencies within the coverage of federally operated NPDES programs.

ARGUMENT

A STATE WASTE DISCHARGE PERMIT PROGRAM, OPERATING AS AN APPROVED PART OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM OF SECTION 402 OF THE FEDERAL WATER POLLUTION CONTROL ACT, APPLIES TO ALL WHO DISCHARGE POLLUTANTS FROM POINT SOURCES INTO WATERS OF THE UNITED STATES WITHIN A STATE, INCLUDING FEDERAL AGENCIES

I.
INTRODUCTION

A. The Federal Water Pollution Control Act Amendments of 1972—General background

On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 became effective. Enacted as the result of an overriding of a presidential veto,[2] the new act undoubtedly provides for the most comprehensive, most expensive and most ambitious attack upon a pollution problem in the

[2]See "Message of the President of the United States" set forth in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 137-139, Committee Print, 93d Cong., 1st Sess., (1973).

nation's history. By 1985, the act's first section provides, in part, that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated * * *." Section 101 (a) of the FWPCAA; 33 U.S.C. (Supp. III) 1251(a).

To accomplish this goal, the Congress provided three major tools in the new act. The first is a greatly expanded and fully funded assistance program for the financing of publicly owned waste treatment facilities.[3] Section 201-212 of the FWPCAA; 33 U.S.C. (Supp. III) 1281-1292. The second involves a substantially increased emphasis on research and planning, as well as financial assistance to aid in the administration of state water pollution control programs. Title I and Sections 208 and 209 of FWPCAA; 33 U.S.C. (Supp. III) Subchapter I, 1288 and 1289.

The third tool relates to requirements respecting control and abatement of pollution through various regulatory programs. Stated simply, and in the most general of terms, the FWPCAA provides that (1) regardless of the quality of the waters to which a discharge of pollutants is proposed and (2) even though the proposed discharge would not violate any federal and state established receiving water quality standards, all discharges from point sources

[3]The "impoundment" by the Federal Executive Branch of a large portion of the $18,000,000,000 authorized for the program has hampered the effectiveness of this tool. The power of the executive branch to "impound" these funds was resolved by this Court in *Train v. City of New York*, 420 U.S. 35 (1975).

must be provided with high levels of treatment prior to discharge to navigable waters.[4] See generally Title III of the FWPCAA; 33 U.S.C. (Supp. III) 1311-1318. To insure that these treatment levels (or "effluent limitations"), together with federal and state receiving water standards and time schedules for waste treatment upgrading, are complied with, a new control and abatement requirement—the satisfying of the provisions of the National Pollutant Discharge Elimination System—was established. Section 402 of the FWPCAA; 33 U.S.C. (Supp. III) 1342.

B. The National Pollutant Discharge Elimination System

Prior to FWPCAA there was no comprehensive federal waste discharge permit program authorized by a federal statute. The operation of such permit programs were exclusively the responsibility of the various states.[5] However, with the announcement by the National Administration in 1970 of the activation of the long slumbering permit authority of

[4]The treatment requirements of the FWPCAA are called "effluent limitations." Section 301 of the FWPCAA provides that for all dischargers, other than publicly owned treatment works, not later than July 1, 1977, effluent limitations are to be achieved which represent the application of the "best practicable control technology currently available." At the same time, all publicly owned waste treatment facilities must utilize "secondary treatment" and if an industrial discharger sends its wastes through a publicly owned treatment works, certain "pretreatment standards" must be met. Not later than July 1, 1983, effluent requirements must be met which represent the "best available technology economically achievable," and for publicly owned waste treatment facilities, which represent the application of the "best practicable waste treatment technology." 33 U.S.C. (Supp. III) 1311.

[5]The State of Washington established a waste discharge permit program for private sources in 1955. Wash. Rev. Code 90.48.160 et seq.

the "Refuse Act of 1899,"[6] as a waste discharge permit program for private discharges of wastes to waters of the United States, this state monopoly was extinguished.[7] As a result of this action of the federal government, a situation was created whereby dischargers to navigable waters, in many states, were placed in the position of obtaining permits from both state and federal governments; a condition with the potential for developing wasteful, duplicative activities which placed unnecessary burdens on both public and private resources.

The NPDES was undoubtedly established to eliminate this unsatisfactory condition. 2, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1488, Committee Print, 93d Cong., 1st Sess., (1973). By creating a "national" (rather than "federal") permit system, the Congress provided for a cooperative federal-state effort which contemplated that, whenever possible, only one permit program—a state endeaver[8]—would be in opera-

[6]33 U.S.C. 407.

[7]Presidential Executive Order Number 11574, 35 Fed. Reg. 19627.

[8]Both the legislative and executive branches of the State of Washington have accepted the challenge of operating a state permit program as a part of the NPDES. The legislature responded in early 1973 by enacting Chapter 155, Wash. Sess. Laws of 1973. Section 1 provides in pertinent part that:

> * * * the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington. [Wash. Rev. Code 90.48.010]

Section 4 thereof states, in part, that the Washington State Department of Ecology is granted

> Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington. * * * [Wash. Rev. Code 90.48.260(1)]

tion in each state.[9] This approach is clearly consistent with statement of basic state responsibilities for water pollution control contained in that portion of Section 101(b) of the FWPCAA which provides that

> "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, * * *."

The issue to be decided in this case is whether federal agencies are subject to the NPDES when that system is operated by a state. In terms of Washington State, which is dotted with numerous federal facilities, must federal agencies which discharge wastes to state waters obtain a permit from the state for their federal irrigation projects, military bases, atomic energy facilities and power plants?

C. The "Supremacy" and "Plenary Powers" Clauses of the United States Constitution

As just noted, this case concerns the authority of a state to regulate federal agency activities in-

[9]Comments of Rep. Terry during House debate on H.R. 11896, March 27, 1972. *1 A Legislative History of the Water Pollution Control Act of 1972*, p. 580, Committee Print, 93d Cong., 1st Sess., (1973). See also the United States E.P.A. publication *The National Water Permit Program* 6 (June 1, 1973).

volving water pollution control. Before proceeding further, we point out that the United States has, throughout this litigation, raised the Supremacy Clause (U.S. Const., Art. VI, cl. 2) and the Plenary Powers Clause (U.S. Const., Art. I, Sec. 8, cl. 17) as constitutional bars to state regulation of federal facilities. Examples are shown in the "Brief for the Petitioners," pp. 13 and 18-20.

The State of Washington does not contend that it may regulate federal facilities absent congressional authorization. However, nothing in the United States Constitution prohibits such an authorization of regulation by Congress. As stated in *Mayo v. United States*, 319 U.S. 441, 446 (1943), "[I]t lies within Congressional power to authorize regulation * * * by the state of federal instrumentalities." Only recently this Court observed in *Evans v. Cornman*, 398 U.S. 419, 423 (1970) that "Congress has now permitted the states to extend important aspects of state control over federal areas." This is true whether the case is related to the Supremacy Clause or the Plenary Powers Clause.[10]

The State of Washington contends that the FWPCAA explicitly authorizes regulation of federal facilities by the state. In sum, this case involves issues of statutory construction; interpretation of

[10]See *United States v. Sharpnack*, 355 U.S. 286 (1958) upholding the constitutionality of the Federal Assimilatives Crimes Act of 1948 (18 U.S.C. § 13) which made state criminal laws applicable within federal enclaves (in that case, an Air Force base). See also, *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940) applying state law to a contractor constructing a post office under contract with the federal government on federal land.

the FWPCAA. There are no constitutional issues to be resolved.

The remainder of this brief discusses the relationship of the NPDES to discharges of pollutants to navigable waters from federal facilities. The underlying issue is whether federal agencies must comply with the requirements of the NPDES for facilities which so discharge. The primary inquiry is whether a state waste discharge permit-issuing program, operating under the NPDES, applies to federal facilities that discharge to waters of the United States within a state.

II.

TAKEN AS A WHOLE THE FEDERAL WATER POLLUTION CONTROL ACT IS CLEAR; THE PERMIT SYSTEM OF THE NPDES IS APPLICABLE TO FEDERAL FACILITIES

A. The Cornerstone—Section 313

Resolution of this case involves, in large measure, the meaning of Section 313 of the FWPCAA, 33 U.S.C. (Supp. III) 1323, which reads in part as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants *shall comply with Federal, State,*

> *interstate, and local requirements respecting control and abatement of pollution to the same extent that any person* is subject to such requirements, including the payment of reasonable service charges. * * * [Emphasis added.]

Section 301(a) of the FWPCAA, 33 U.S.C. (Supp. III) 1311(a), prohibits any discharge of pollutants except as in compliance with Section 402, 33 U.S.C. (Supp. III) 1342. Section 402 requires an NPDES permit, which is issued by E.P.A., or, after approval of a state's program by E.P.A. pursuant to the standards of Section 402, it is issued by the state. Permits issued by a state are subject to review and approval by E.P.A. pursuant to Section 402(d).

The NPDES permit system is the heart of the FWPCAA. By this we mean that, through the operation of this system, the precisely tailored requirements for waste treatment and, most importantly, the timing of waste treatment upgrading, for specific waste discharging facilities are established.

Is the NPDES a requirement respecting the control and abatement of pollution within the meaning of Section 313?

Any attempt to answer this question must begin by using the usual or ordinary meaning of the word "requirements." Normally, at this point the inquiry will end. There are some exceptions, however, as stated in *Commissioner v. Brown*, 380 U.S. 563, 571 (1965):

> Unquestionably the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute." [Citations omitted.] But it is otherwise "where no such consequences would follow and where * * * it appears to be consonant with the purposes of the Act * * *" [Citation omitted.]

The usual meaning of the word, "requirement," is something that is obligatory or demanded as a condition, a necessity.[11] Federal law demands and obligates each person desiring to discharge wastes into the waters of this country to secure an NPDES permit. It is clearly a requirement respecting control and abatement of pollution. Neither the statutory language nor ordinary use of the word, "requirements" differentiates between substantive and procedural requirements.[12] A normal or usual reading of Section 313 would thus appear to subject federal facilities

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[11] WEBSTER'S NEW WORLD DICTIONARY (College Edition, 1966) defines "requirement" as: "1. a requiring. 2. something required; something obligatory or demanded, as a condition: as, the *requirements* for college entrance. 3. something needed; a necessity; need.

[12] In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) the Court constructed what is now Section 311(o)(2) of the FWPCAA (33 U.S.C.A. § 1321(o)(2)), which reads:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil or hazardous substance into any waters within such state. (emphasis added)

The Court faced the question of "whether the waiver of pre-emption by Congress in [Section 311(o)(2)] concerning the imposition by a State of 'any requirement or liability' is valid." 411 U.S. at 343-44. The Court answered the question in the affirmative with respect to a Florida statute which included license provisions. See 411 U.S. at 330, note 3. (Federal facilities were not involved.) Nobody had the imagination to suggest that "requirement" as used in that section did not include a state-imposed licensing requirement.

to the NPDES permit requirements of Section 402; and Section 402, without question, does not authorize withholding these facilities from the ambit of an otherwise approvable state program.

Is this an "absurd result?" There appears to be nothing absurd in treating federal facilities the same as private facilities. In fact it is not even unusual. Congress has already voluntarily subjected federal facilities and programs to various forms of state and local regulation and participation.[13]

It is a result which "would thwart the obvious purpose of the statute?" To the contrary, as noted earlier, Section 101(b) of the FWPCAA, 33 U.S.C. (Supp. III) 1251(b)) states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution * * *." This purpose would be furthered by a normal reading of the word, "requirements."

"Requirements respecting control and abatement of pollution" as those words are ordinarily understood, would include a permit for waste discharges necessitated by the provisions of federal and state law. Federal facilities must meet these requirements, which include the necessity of obtaining an NPDES permit. There is nothing absurd about this result, and it furthers the stated policy

[13]See, for example, the statutes and programs discussed in *United States v. Sharpnack*, 355 U.S. 286 (1958), and *New York v. O'Neill*, 359 U.S. 1 (1959).

of the Act. As implied by *Commissioner v. Brown*, *supra*, at this point statutory interpretation must stop. There is no justification for extensive journeys into an ambiguous legislative history or into arguably analogous provisions of other statutes in an attempt to avoid the literal or usual meaning of the words of Section 313.

B. Other Roadsigns of the Federal Water Pollution Control Act

There are a number of indicators within the Federal Water Pollution Control Act which support our contention that the words of Section 313, given their usual or ordinary meaning, require federal agencies to satisfy the permit obtaining requirements of the NPDES.

(1) The Wording of the "Citizen Suits" Provision—Section 505

The writers have found only one other section of the FWPCAA which clearly indicates whether the "requirements" of Section 313 were intended to include the NPDES permit requirement. This reference, however, appears to remove any doubt as to the intention of Congress.

Section 505 (33 U.S.C. (Supp. III) 1365) authorizes citizen suits. These include suits against the United States for an alleged violation of "an effluent standard or limitation under this chapter." This critical phrase is then defined in Section 505(f):

> For purposes of this section, the term "effluent standard or limitation under this chapter" means * * * (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (*including a requirement applicable by reason of section 313 of this Act*). [Emphasis added.]

A more clear statement of Congressional intent could hardly be imaginable. Citizens may bring suit to enforce permits issued under Section 402; *and these include permits and conditions thereof applicable because of Section 313*. Congress therefore understood that Section 313 requires federal facilities to obtain NPDES permits pursuant to Section 402. No other interpretation of Section 505(f) is plausible.

(2) THE EXPRESS EXEMPTION OF FEDERAL ACTIVITIES FROM CERTAIN REQUIREMENTS —SECTIONS 306, 308 AND 401

We next note that if the authors of the FWPCAA had desired to exempt the Federal Government from the requirements of the NPDES, they would have done so expressly, especially in light of the broad, all inclusive, mandatory wording of Section 313. That the authors knew how to write and insert such "exempting" language is clear from the inclusion of language so stating in the *same title* of the FWPCAA that created the NPDES. We refer to the wording of Section 401(a)(6) which provides:

> No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

Other examples of express exemptions in the Act

are found in Sections 306(c) and 308(c) which exempt federal facilities from certain state programs. In addition we point out that Section 402, which creates the NPDES permit program, contains no exemption of federal facilities. This alone creates a strong inference that no exemption was intended.[14]

(3) THE PAYMENT OF REASONABLE SERVICE CHARGES

Attention is next called to the last seven words of the first sentence of Section 313—"including the payment of reasonable service charges." This grant of payment power relating to satisfaction of water pollution control and abatement requirements fits comfortably into the concept that if there is a service fee or charge involved in the processing of a federal agency application for a NPDES permit (under a state operated program), there will be no concern over a federal agency's authority to make the pay-

[14]Petitioners contend that a state-operated NPDES does not apply to federal facilities because a program cannot be developed by a state which covers federal facilities and satisfies all the criteria required for approval of a state program by section 402. The two criteria which cannot be included, the Environmental Protection Agency contends, are contained in the provisions of sections 306 and 308 which exempt federal facilities from state enforcement of new source performance standards (section 306(c)), and inspection, monitoring and entry procedures (section 308(c)). This contention fails for the simple reason that the state program must include, according to section 402(b)(1) and (2), all *applicable* requirements of sections 306 and 308, among others. The fact that requirements for state enforcement of new source performance standards and state monitoring, entry and inspection procedures may not be applicable to federal facilities in no way detracts from the state's ability to insure compliance with the "applicable requirements" of the Act. Sections 306 and 308 thus do not justify the Environmental Protection Agency's failure to approve a state program applying to federal facilities. Likewise, the Environmental Protection Agency's contention in this regard does not detract from the other clear indicators in the Act evidencing a Congressional intention to cover federal facilities in state-operated NPDES programs.

ment. This, we believe, describes accurately the intention of Congress as to the inclusion of the seven words.[15]

E.P.A. contends, however, that "reasonable service charges" refer only to utility user-chargers. (Brief for the Petitioners, pp. 23-24.) The Court of Appeals discussed this contention in its opinion with this persuasive analysis:

> Respondents contend that these "reasonable service charges" refer to those for state and local sewage treatment hookups. We disagree. Although the legislative history of Section 313 is silent regarding the meaning of the "reasonable service charges" language, it seems the better interpretation is to read it as referring to charges incident to state permit programs. Even if we were to read the word "requirements" in Section 313 to mean "effluent standards and limitations," as respondents contend we should, interpreting the "reasonable service charge" language to refer to municipal waste disposal charges would create a *non sequitur*.
>
> Moreover, interpreting "reasonable service charges" to refer to charges associated with state permit programs would be in accord with the canon of statutory construction that, where language in a statute can be given two possible interpretations, that interpretation should be chosen which does not render the language

[15]Our construction of the "reasonable service charges" phrase is supported by a statement of Senator Howard Baker, a member of both the Senate Committee on Public Works and the "Conference Committee," which drafted the act. Senator Baker stated:

> "It is my recollection that the language on payment of such charges was intended to authorize Federal agencies' compliance with such requirements even if, for example, this meant that an agency had to pay a charge or fee to a State as part of a requirement that the agency obtain a State effluent permit under section 402 of the act." 120 Cong. Rec. S 16644 (Sept. 16, 1974).

> meaningless. Although a state's taxing power cannot operate within the confines of a federal enclave without the consent of the United States, *Mississippi River Fuel Corp. v. Mouton*, 390 F.2d 34, 35 (5th Cir. 1968), no serious contention has ever been made that subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of municipal sewer system costs. On the other hand, any permit program charges might be sufficiently in the nature of a tax that specific federal consent would be required before they could be certified as "properly payable" federal obligations.

(4) THE "RELIEF VALVE" POWERS OF THE PRESIDENT — SECTION 313

A fourth indicator is the power provided to the President in Section 313 to:

> * * * exempt any effluent source of any department, agency, or instrumentality in the executive branch if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of sections 306 and 307 * * *[16]

With the inclusion of this provision, Congress has empowered the President with sufficient powers to protect the national interest arising from the various requirements of the Federal Water Pollution Control Act and other pollution control laws, including those developed by a state operated NPDES per-

[16]Section 306 relates to standards of treatment for new pollutant discharge sources while Section 307 pertains to effluent standards for "toxic" pollutants.

mit program and incorporated in a state NPDES permit. In a real sense, then, the Congress has considered the possibility of excluding federal agencies from state NPDES programs and concluded that a federal discharger should be relieved from such NPDES requirements upon a determination of the President.

III.

THE USE OF LEGISLATIVE HISTORY

A. In Light of the Clarity of Meaning of the Federal Water Pollution Control Act, Taken in its Entirety, It Is Inappropriate to Resort to Legislative History to Determine the Intent of Congress

A basic rule of statutory construction is that statutes are to be construed in a manner which effectuates the intent of the enacting body and that in construing a statute the first examination should be to the language of the statute. If the language and the purpose of a statute appears with reasonable certainty, there is no need to resort to other rules of construction to ascertain its meaning. *United States v. Ray*, 488 F.2d 15 (10th Cir. 1973). A closely related rule directs courts to give effect to unambiguous statute in accordance with its plain and obvious meaning. Resort to legislative history should not be used to change the meaning of clear and unequivocal statutes. *United States v. Oregon*, 366 U.S. 643 (1961).

Based upon our previous evaluation that the provisions of the Federal Water Pollution Control Act, taken together, are clear with regard to the applicability of state operated NPDES permit programs to federal facilities, it is unnecessary, indeed inappropriate, to examine legislative history.

B. Even Assuming the Appropriateness of Examining Legislative History, That History Is Too Blurry To Be of Assistance

The petitioners' brief devotes almost one-third of its argument to the proposition that the legislative history is decisive of Congressional intent. Brief for the Petitioners pp. 33-39. The United States places particular emphasis on the words "effluent limitations," "limitations," "performance standards," and "effluent standards," which in some cases appear to have been used interchangeably. From the use of these words, the United States has concluded Congress did not intend to "submit federal facilities to state procedures; all point to federal compliance with applicable substantive pollution abatement requirements." Brief for the Petitioners, p. 35.

We have examined the various Congressional reports containing the discussions of Section 313 upon which the Federal government relies so heavily. These materials are very brief and can be read in five minutes. Most importantly, contrary to the assertion of petitioners, they are of no real help. The

very materials which are quoted by E.P.A. in its opening brief, pp. 34-38, as significant are either far too ambiguous or imprecise to be relied upon to decide this case. For example, two paragraphs of the Report of the Senate Committee on Public Works accompanying S.2770 which discuss section 313 have been quoted in the Petitioners' Brief at page 34. The first paragraph reads in part:

> This section, similar to one in existing law requires that Federal facilities meet the same *effluent limitations* as private sources of pollution.

The emphasis was supplied by the petitioners. Yet in the second quoted paragraph, Section 313 is described as follows:

> "This section requires that federal facilities meet all control requirements as if they were private citizens."

The petitioners did not emphasize any of these words.

E.P.A. also quotes in its opening brief, at page 38, the following portion of the Conference Report accompanying S.2770 (now FWPCAA) as helpful to its position:

> *Senate Bill*
>
> Section 313 requires Federal facilities to meet the same effluent limitations as other sources of pollution, unless the facility is specifically exempted by the President. The President cannot exempt a Federal source from national performance standards or toxic and pretreatment standards.
>
> *House Amendment*
>
> Section 313 requires Federal facilities to meet the same requirements as private sources of pollution unless specifically exempted by the President in essentially the same manner as the Senate bill.
>
> *Conference Substitute*
>
> This section is the same as the Senate bill and the House amendment. 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 318, Committee Print, 93d Cong., 1st Sess., (1973)

Contrary to the views of E.P.A., we have struggled with these descriptions and submit that they are so ambiguous as to be of no help to the court.[17]

IV.

THE ENVIRONMENTAL PROTECTION AGENCY ADMINISTRATOR'S INTERPRETATION OF THE APPLICABILITY OF THE NPDES

A. The Conclusion of the Administrator That Federal Agencies Are Subject to the NPDES Is Correct

The E.P.A. raises the rule of statutory construction that the interpretation given to an ambiguous statute by those charged with its execution is entitled to great weight. *Red Lion Broadcasting Company v.*

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[17]The National Administration followed the FWPCAA closely during its journey through Congress. 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 143, Committee Print, 93d Cong., 1st Sess., (1973) contains a letter, dated October 11, 1972, the Administration's chief spokesman with regard to the FWPCAA, William Ruckelshaus, Administrator of the Environmental Protection Agency, wrote to the Office of Management and Budget

Federal Communications Commission, 395 U.S. 367, 381 (1969). Reliance on this rule is appropriate only when a statute is ambiguous. We, as stated earlier, contend the statute is reasonably clear on its face; therefore, the rule is inapplicable here. Likewise, the rule is usually applied when an administrative interpretation has been in effect for a significant period of time. *Merrit v. Cameron*, 137 U.S. 542, 552 (1890). The interpretive regulation provided by E.P.A., that a state operated NPDES does not apply to federal agencies, has been in effect only for a very short period. In any event, this court is not in any sense bound by administrative interpretation and this court should support E.P.A.'s interpretation only if it is supported by the statute upon which it is based. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726 (1973)

Most importantly, the State of Washington is in agreement with E.P.A. on a crucial, perhaps decisive, issue in this case. We agree with conclusion of E.P.A. that *the NPDES applies to federal facilities* generally.[18] E.P.A.'s administrative stance in reaching this

recommending presidential approval of the bill. Page 146 thereof contains the following discussion of Section 313 by Mr. Ruckelshaus:

> The law would be changed to require Federal facilities to comply with all Federal, State, interstate, and local requirements respecting water pollution control. The President may exempt facilities where he determines it is in the paramount interest of the United States. No exemptions are permitted with respect to toxic substances, pretreatment requirements, and new source performance requirements.

[18]At page 10 of its opening brief, E.P.A. describes its activities in the geographic area covered by the Ninth Circuit Court of Appeals. One hundred eighty-seven NPDES permits have been issued for that area by E.P.A. as of March 31, 1975 and 40 applications for permits for other federal agency discharges were being considered by E.P.A.

conclusion[19] is, quite obviously, inconsistent with the contention E.P.A. submitted to this court that the word "requirements" as used in Section 313 refers only to substantive requirements; and that procedural requirements, such as a state NPDES operated program, fall outside its scope. See Brief for the Petitioner, pp. 16, 38.

The actions of E.P.A. speak louder than their words to this court on this point. E.P.A. is correct in interpreting "requirements" to include the NPDES permit program. The meaning of the word "requirements" is constant. If "requirements" includes NPDES permits when E.P.A. is administering the program, then the same is true when the state is administering it.

B. The Only Error in the Environmental Protection Agency Interpretation of the Federal Water Pollution Control Act Was the Exclusion of Federal Agencies from State Operated NPDES Programs

The issue to be resolved in this case is narrow. The State's single dispute with E.P.A. relates to the federal agency's conclusion pertaining to the NPDES contained in the regulation of the agency which states, at 40 C.F.R. 125.2(b):

> The regulations in this part do not prescribe

[19]40 C.F.R. 125.2(a)(2), a regulation interpreting and implementing the NPDES, the E.P.A. provided:

> The regulations in this part also prescribe the *policy and procedures to be followed in connection with permits authorizing discharges into the navigable waters*, the waters of the contiguous zone, and the oceans *from any agency or instrumentality of the Federal Government*, and from any Indian activity on Indian lands. (Emphasis supplied.)

policy or procedures for the issuance of permits by States under programs approved by the Administrator pursuant to section 402(b) of this Act. *Such State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States.* (Emphasis supplied.)

The refusal of the E.P.A. to consider federal facilities for inclusion in a permit program operated by the State of Washington is a specific application of the conclusion of 40 C.F.R. 125.2(b). The conclusion of the regulation is without statutory support.

The controlling statute is Section 402 of FWPCAA. It provides, in part:

> At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not quirements which state programs must meet.]

> exist: * * * [There follows a list of re-
> (c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator *shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program* unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines. (Emphasis supplied.)

Section 402, although lengthy, is straight forward. Simply stated it establishes a national system of permit programs. A permit program is to be administered by E.P.A. in every state except in those states whose governors submit approvable programs under section 402(b). In each state with an approvable program, the state is the sole administrator of the NPDES permit program. As noted by the emphasized words of the quoted portion of section 402, the administrator is directed "to suspend" the issuance of permits "as to those navigable waters" covered by the program.

The permit programs of NPDES operated within the various states, whether administered by a state or E.P.A., have the same general coverage. With possibly limited exceptions,[20] there are no distinctions in

[20]The only possible exceptions are contained in Sections 306 and 308 of the FWPCAA. See the discussion in Footnote 14.

state or federal NPDES permit programs because of the nature of the discharge, the nature of the discharger, or the nature of the permit program administrator. In the words of Section 402(a)(3):

> The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, *and requirements* as apply to a State permit program and permits issued thereunder under subsection (b) of this section. (Emphasis supplied.)

This language is consistent with the mandate of section 313 that federal agencies shall comply "to the same extent as a private person * * *."

Further, we note that E.P.A. cannot approve a state program for operation under the NPDES unless the program meets all of the applicable requirements of Section 402(b). Once a state program satisfies such requirements, no provision of Section 402 authorizes E.P.A. to approve only a portion of a state program and disapprove the remainder. It is an all or nothing mandate. Section 402(c)(1) provides clear direction to E.P.A. on this point. If a state program does not meet the requirements of Section 402(b) or the guidelines issued under Section 304(h)(2), E.P.A. "shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines." Implicitly E.P.A. does not have authority to approve until a program is fully approvable.

The following discussion of E.P.A. relationships

with the states under the NPDES, contained in the Report of the Senate Committee on Public Works accompanying S 2770, 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1489, Committee Print, 93d Cong., 1st Sess., (1973), is instructive:

> It is expected that the States will play a major role in the administration of this program.
>
> The Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.
>
> Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall *suspend his activity in such State under the Federal permit program.* * * * (Emphasis supplied.)

Quite clearly, the Senate Public Works Committee, the primary developer of the NPDES, contemplated that E.P.A. would withdraw completely from the permit issuing activity under the NPDES after an approved state program became operable. This, of course, is completely consistent with the express wording of section 402, emphasized on page 29 hereof; namely "the administrator shall suspend the issuance of permits * * * as to those navigable waters subject to such program. * * *"

The determination by E.P.A. to refuse to approve

portions of state programs covering discharges from federal facilities and to retain permit issuing authority for those facilities flies in the face of legislative history. More importantly, that action violates the statutory grading instructions given to E.P.A. for state submitted programs, as well as the policy in NPDES of providing for only one government operating a permit program in any state.[21]

CONCLUSION

Based on the clear meaning of the Federal Water Pollution Control Act, taken as a whole, two conclusions can be drawn which are decisive in this case:

1. Federal agencies are subject to the permit requirements of the National Pollutant Discharge Elimination System; and
2. When the Environmental Protection Agency approves a permit program submitted by a state, pursuant to Section 402(b), as a part of the National Pollutant Discharge Elimination System, all NPDES permit-issuing powers of the Environmental Protection Agency are suspended for the state, and the total responsibility for issuance of such permits, including those required for federal facilities, are vested in the state.

[21]A further indication that E.P.A.'s approval powers pertaining to a "total" program is the nature of E.P.A.'s withdrawal of approval powers contained in Section 402(c)(3). This subsection clearly provides that if E.P.A. withdraws approval of a state program, it does so by withdrawing approval of the state program in its entirety. This, of course, emphasizes the policy that only one government shall operate an NPDES permit program within a state.

Therefore, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX A

SECTION 313—FEDERAL WATER POLLUTION CONTROL ACT

"SEC. 313. Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress

all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

APPENDIX B

SECTION 402—FEDERAL WATER POLLUTION CONTROL ACT

"SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms,

conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactments of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h) (2) of this Act, or the date

of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with,

any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the

permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such work of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial

change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under

subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made

because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

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OCTOBER TERM, 1975

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for the Respondent, State of California

SUMMARY OF ARGUMENT

The central purpose of the 1972 amendments to the Federal Water Pollution Control Act was to provide, first, for the development of standards for effluent discharges rather than ambient water quality, and, second, for the development of standards for individual dischargers by the issuance of permits. The states are authorized to adopt programs for the issuance of permits under section 402(b) of the act. Nothing in that section provides an exemption for federal dischargers from such state programs.

Moreover, section 313 of the act requires federal dischargers to comply with state "requirements respecting

control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." That section confirms and clarifies the obligation of federal dischargers to comply with state permit programs under section 402(b). Section 313 is not intended to limit federal compliance to effluent "limitations" and "standards" adopted by the states under the act, as contended by the petitioners; those terms are used in a precise sense in the act, and Congress would have used those terms in section 313 if it had intended for the section to be so limited.

The authority of the Administrator of the Environmental Protection Agency to issue permits to federal dischargers, in states where he operates his own permit program, is based on sections 402 and 313, the same sections which provide such authority to the states. Thus, if the Administrator has authority to issue permits to such dischargers, so do the states. Otherwise, such dischargers would be free of any permit control under the act.

Other statutory references support this view. Section 505(f) specifically describes a "requirement" in section 313 as including a permit issued under section 402. Section 510 specifically distinguishes between a "requirement respecting control or abatement of pollution"—the phrase used in section 313—and a "standard or limitation," thus undercutting the petitioner's position that these phrases are synonymous. The reference to "reasonable service charges" in section 313 denotes charges levied by the states for permit applications submitted by federal dischargers, thus indicating that states have authority to issue permits to such dischargers. Sections 308 and 306, which provide exemptions for federal dischargers from certain state programs under the act, do not imply an exemption for such

dischargers from state permit programs under section 402(b), and indeed such an exemption was expressly rejected by Congress.

The petitioner's interpretation of the act is administratively impractical. The petitioner concedes that the states have authority to formulate the "effluent limitations"—consisting of conditions relating to numerical and time limitations—in permits issued to federal dischargers. It is administratively unsound to deny the states authority to issue the permit containing such conditions. The states achieve no additional "control" over federal dischargers by their authority to issue such permits, since any such "control" results from their authority to formulate and administer the conditions in such permits, not to issue the permit itself.

The act's legislative history is silent concerning the issues in this case. Any inferences in this history support the position of the respondents, not the petitioner.

The Administrator's interpretation of the states' authority under the act is, *per se*, entitled to no weight in construing such authority.

The federal principles found in the Supremacy Clause and Plenary Powers Clause are helpful in defining the limits of state authority where the state acts pursuant to its inherent, reserved powers in furtherance of a policy peculiar to the state, but not where—as here—it acts pursuant to a congressional directive in furtherance of a national policy set by Congress. Further, Congress built ample safeguards into the act to limit the intrusion of states upon federal activities and enclaves, and these safeguards fulfill the purposes of these constitutional principles.

Section 118 of the Clean Air Act, in defining the obligation of federal agencies to comply with state "requirements" under that act, contains language similar to that found in section 313 of the Federal Water Pollution Control Act. The similarity between these and other sections of the acts might justify a harmonious construction of sections 313 and 118. However, the dissimilarities between the acts, particularly with respect to the states' express authority to issue permits under the water act, might justify the opposite result. In any event, the water act was amended in 1972 to remove any ambiguities which remain in the air act. Accordingly, section 118 might be construed in light of the meaning of section 313, but not *vice versa*.

ARGUMENT

I. The Language, Structure and Objectives of the Water Act Indicate That Federal Dischargers Must Comply with State Permit Programs Adopted Under the Act.

The petitioner argues that this case hinges on the meaning of section 313 of the Federal Water Pollution Control Act (the "water act"), which requires federal agencies and instrumentalities to comply with federal and state "requirements respecting control and abatement of pollution . . . ." 33 U.S.C. (Supp. III) §§ 1251-1376, 1323. He argues that this section must be interpreted similarly to section 118 of the Clean Air Act (the "air act"), 42 U.S.C. §§ 1857-1858a, 1857f, which uses similar language in describing the obligation of federal agencies under that act. Finally, he asserts that the word "requirements" in these sections denotes "substantive" requirements, such as effluent "limitations", but not "procedural" requirements such as permits.

The petitioner fundamentally misconceives the language, structure and objectives of the water act. By focusing on

the meaning of section 313, he ignores the fact that this case hinges principally on the meaning of section 402 of the water act, 33 U.S.C. (Supp. III) § 1342, which authorizes states to issue permits under the act; section 313, rather than imposing an independent obligation on federal agencies, only confirms and clarifies the obligation imposed on such agencies by section 402. By reading section 313 in light of section 118 of the air act, he ignores the fundamentally different approaches of the water and air acts to the problem of pollution; this difference derives from the fact that—although the acts were substantially similar prior to 1972—the water act was fundamentally restructured by amendments passed in that year, and the air act was not. By distinguishing between permits and effluent "limitations," the petitioner ignores the fact that the mechanism by which such "limitations" are formulated and applied to individual dischargers is by the permit system established in section 402. To fully appreciate the extent to which the petitioner misconceives the water act, it is necessary to first trace the historical evolution of the act to fully understand its purposes.

A. The Primary Purpose of the 1972 Amendments to the Water Act Was to Provide Standards for Effluent Limitations Rather Than Ambient Water Quality, to Provide for the Development of Such Standards for Individual Dischargers by a Permit System and to Make the States Primarily Responsible for the Administration of the Permit System.

The water act, amended extensively since its passage in 1948, has provided for increasingly tougher controls over water polluters, in an effort to eradicate the national cancer of water polution. An underlying theme of the act, since its original passage, has been that the states have the primary

responsibility for achieving that goal.[1] Until 1972, however, the act failed to provide clear and effective directives as to how that goal was to be achieved.

The original 1948 act provided that the U. S. Surgeon General was to develop "programs" for the prevention of water pollution. 62 Stat. 1155 (1948). The programs were to be enforced by abatement actions brought by the states, *id.* at 1156, and by federal officials in instances where the states failed to act, *id.* at 1156-1157. The act declared a congressional policy to "recognize, preserve, and protect the primary responsibilities and rights" of the states to prevent water pollution. *Id.* at 1155. No mention was made of the types of programs which were to be adopted and enforced under the Act, much less the obligation of federal dischargers under the act.

The act was amended in 1956 to enlarge the authority of the states to meet their responsibilities under the act, and to provide for increased cooperation between federal and state agencies towards that end. The amendments authorized each state to develop a "plan," subject to approval of the Surgeon General, setting forth methods for improving water quality. 70 Stat. 498, 500 (1956). The plan was to be enforced by abatement actions brought by state or federal officials. *Id.* at 504-505. Federal dischargers were

1. Senate Report No. 92-414, discussing the proposed amendments to the act, commented:

> "For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. Rep. No. 92-414, 92nd Cong., 1st Sess. 1 (1971), 2 *Legis. Hist.* 1419.

"*Legis. Hist.*" refers to the legislative history of the water act compiled by the Environmental Policy Division of the Library of Congress in two volumes. See *A Legislative History of the Water Pollution Control Act Amendments of 1972* (Comm. on Publ. Works Print, 1973).

directed to "cooperate" with the states, to the extent "practicable and consistent with the interests of the United States and within any available appropriations." *Id.* at 506. The admonition was repeated that the states bear the "primary responsibilities and rights" for preventing water pollution. *Id.* at 498. However, the amendments failed to provide clear directives as to how the states were to attain that objective, and largely gave federal dischargers the option of voluntarily complying with such programs as the states might develop.

Amendments in 1965 and 1970 strengthened and clarified the authority of the states, and the obligation of federal dischargers to comply with their exercise of authority. The 1965 amendments authorized the states to adopt "water quality standards," which included both "water quality criteria" and a "plan" for the "implementation and enforcement" of the criteria. 79 Stat. 903, 908 (1965).[2] The "standards" were to be enforced by abatement actions brought by state or federal officials. *Id.* at 909.[3] The 1970 amendments obligated federal dischargers to comply with such "standards." 84 Stat. 91, 107 (1970).[4] These amendments were thus similar to the amendments to the air act passed in 1970. The latter amendments authorize the states to adopt a "plan" for the "implementation" and "enforcement" of the "ambient air quality standards" provided in that act, 42 U.S.C. §§ 1857c-4, 1857c-5, and provide for the enforcement of such plans by abatement actions brought by state or federal officials,

2. These provisions were codified in 33 U.S.C. 1160(c)(1) (1970).

3. This provision was codified in 33 U.S.C. § 1160(b)(1970).

4. This provision was codified in 33 U.S.C. § 1171(a)(1970).

id. at §§ 1857c-5, 1857c-8, 1857d.[5] As a result of these amendments to the water and air acts, the acts—prior to 1972—sought to achieve similar objectives by similar means.

However, the pre-1972 amendments to the water act still failed to provide an adequate response to the problem of water pollution. By providing standards for "water quality," the amendments focused on the quality of the waters receiving discharges of effluent, not on the quality of the effluent itself. Thus, the primary concern of the amendments was the formulation of *ambient* water quality standards generally applicable to all who discharge effluent into a particular body of water, not the formulation of standards applicable to individual dischargers within that category. In a sense, the amendments focused on the effects, rather than the causes, of water pollution. Many states, unsure of their rights and duties under the act, failed to diligently seek the development of standards for individual dischargers, with the result that the standards in many states reflected the lowest legitimate water uses, such as industrial uses. To fill the resulting void in effective water quality control, federal officials began vigorously enforcing the Refuse Act of 1899, which prohibits the discharge of any matter into the nation's navigable waters except pursuant to a federal permit. 33 U.S.C. § 407 (1899). To restore the balance between federal and state control over water quality, and to strengthen such control, Congress substantially re-constructed the water act by amendments passed in 1972. See generally H.R. Rep. No. 92-911, 92d

5. However, the amendments to the water and air acts were different in that the water act provided that the "standards" were to be developed by the states, and the air act provides that the "standards" are to be developed by the Administrator of the Environmental Protection Agency. *Compare* 79 Stat. 903, 908 (1965), as codified in 33 U.S.C. § 1160(c)(1)(1970), *with* 42 U.S.C. § 1857c-4(a)(1).

Cong., 2d Sess. 124-128 (1972), 1 *Legis. Hist.* 811-815; S. Rep. No. 92-414, 92d Cong., 1st Sess. 69-73 (1971), 2 *Legis. Hist.* 1487-1491; 117 Cong. Rec. 38798-38800, 92d Cong., 1st Sess. (1971) (remarks of Senator Edmund Muskie).[6]

The 1972 amendments radically altered the focus of the act, by providing for standards applicable to individual dischargers through a permit system.[7] First, the amendments authorize the Administrator of the Environmental Protection Agency (the "Administrator") and the states to develop "limitations" and "standards" for discharges of effluent, 33 U.S.C. (Supp. III) §§ 1311, 1312, 1313, 1316, 1317[8], a change from the pre-1972 focus on ambient water quality standards. Second, the amendments provide, in section 402, that these limitations are to be tailored to individual dischargers by a program denominated as the National Pollutant Discharge Elimination System ("NPDES"). *Id.* at § 1342. Under that system, no person may discharge pollutants from a point source, such as a pipe or outfall, into the nation's navigable waters except pursuant to an NPDES permit. *Id.* at §§ 1311,

6. See also Note, *Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis. L. Rev. 893, 893-895 (1973); Note, *Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 Harv. Jour. on Leg. 565, 571-572 (1973); Comment, *Local Control of Pollution from Federal Facilities*, 11 S. Diego L. Rev. 972 (1974).

7. These standards are provided in Title III of the act, commencing at section 301, 33 U.S.C. (Supp. III) § 1311. The act also provides for research and related programs in Title I, commencing at section 101, *id.* at § 1251, and for federal grants for construction works in Title II, commencing at section 201, *id.* at § 1281.

8. The Administrator is to develop "effluent limitations" by 1977 and 1983, based on the "best practicable" and "best available" technology, respectively. 33 U.S.C. (Supp. III) § 1311(b). The states may nonetheless adopt more stringent "effluent limitations" than those developed by the Administrator. *Id.* at §§ 1311(b)(1)(C), 1313(e), 1370.

1362(12). Conditions are to be imposed in such permits after administrative hearings, to assure the discharger's compliance with the act. *Id.* at § 1342(a). To assure compliance by federal dischargers with this permit system, section 313 was added to direct such dischargers to comply with state and federal "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . . ." *Id.* at § 1323. Thus, the permit system is the central mechanism by which the act's objectives are to be achieved.[9] After long and frustrating experimentation, Congress finally fashioned a statutory scheme which—by utilizing a permit system—provides a suitably forceful response to the problem of water pollution.

Under the 1972 amendments, the states are expected to bear the major responsibility for administering the NPDES permit system. As Senator Muskie declared during the congressional debate:

> "What it [the bill] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly." 117 Cong. Rec. 38845, 92d Cong., 1st Sess. (1971).[10]

9. Senator Edmund Muskie, the Senate floor leader for the 1972 amendments, summarized "the two major changes" in the act as "the change from water quality standards to effluent limits as the control mechanism, and the use of the permit system against the discharge of pollutants." 117 Cong. Rec. 38799, 92d Cong., 1st Sess. (1971).

10. The Senate report commented on section 402 as follows:

> "It is expected that the States will play a major role in the administration of this program.
>
> "The Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.
>
> "Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program. The Administrator would periodically assess the performance of the State program and have the authority to withdraw this delegation upon finding that the State is not carrying out its program properly." S. Rep. No. 92-414, 92nd Cong., 1st Sess. 71 (1971), 2 *Legis. Hist.* 1489.

Accordingly, although section 402(a) authorizes the Administrator to develop his own permit program for each state, 33 U.S.C. (Supp. III) § 1342(a), section 402(b) authorizes each state to develop its own permit program to replace that of the Administrator, *id.* at § 1342(b). Once a state program is developed, the Administrator "shall" approve the program if it meets the standards of the act, *ibid.*,[11] and "shall" thereupon suspend its own permit program in that state, *id* at § 1342(c).[12] The Administrator has no discretion to withhold approval of a state permit program which meets the act's standards,[13] and each state thus has the option of making its own permit program applicable within the state.

11. The Administrator may withdraw approval of a state permit program if the state fails to adequately operate and enforce the program. *Id.* at § 1342(c)(3).

12. Permits are to be enforced by actions brought by the Administrator or the states for injunctive relief, fines and civil penalties. *Id.* at §§ 1319(c), 1319(d), 1342(b)(7).

13. H.R. 11896, the bill which originally passed the House, provided that the Administrator "may" approve a state permit program which meets the act's standards. H.R. 11896, 92d Cong., 2d Sess. § 402(a)(5) (1972), 1 *Legis. Hist.* 1054. The Conference Committee changed the word "may" to "shall," in order to require the Administrator to approve such a program "instead of only permitting the Administrator to do so." Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 139 (1972), 1 *Legis. Hist.* 322.

The 1972 amendments, although fundamentally altering the focus of the act, nonetheless preserve certain existing features of the pre-1972 act. In particular, section 303(e) allows states to develop "water quality standards" and "implementation plans", subject to the Administrator's approval, if such contain "effluent limitations" which are at least as stringent as those adopted by the Administrator. *Id.* at § 1313(e). Thus, section 303(e) retains the states' old authority to develop standards for ambient water quality, and section 402(b) gives the states new authority to make these standards applicable to individual dischargers by a permit system.

Moreover, the 1972 amendments provide that the states' authority to administer the NPDES permit system is a floor, not a ceiling, with respect to their efforts to prevent water pollution. Section 510 emphasizes that the states may develop a more stringent "standard," "limitation" or "requirement" than those otherwise provided in the act. 33 U.S.C. (Supp. III) § 1370. Thus, the act's oft-repeated declaration that the states bear the "primary responsibilities and rights" in preventing water pollution, reiterated in the 1972 amendments, *id.* at § 1251(b), is not a hollow tribute to the states' sovereignty, but an accurate characterization of the overall statutory scheme.

Thus, as we have demonstrated, the 1972 amendments provide for the development and administration of both *generalized* standards applicable to all dischargers within a particular class, and *particularized* standards made applicable to each discharger within the class by a permit system. The Administrator is primarily responsible for the development of generalized standards, with the states retaining authority—under sections 303(e) and 510—to develop more stringent standards than those of the Ad-

ministrator. Under section 402(b), the states are primarily responsible for developing and administering particularized standards for individual dischargers by the NPDES permit system; the Administrator is to assume this responsibility only until it is assumed by the state, and only thereafter if the state fails to fulfill it. Whether federal dischargers must comply with particularized standards developed by the states under the NPDES system depends on the meaning and effect of sections 402(b) and 313, a question which we shall now examine more closely.

B. Section 402(b), by Itself, Obligates Federal Dischargers to Comply With State NPDES Permit Programs, and Section 313 Confirms and Clarifies That Obligation.

The petitioner essentially contends that section 402 contemplates a dual permit program, with the Administrator issuing permits to federal dischargers and the states—after approval of their permit programs—issuing permits to all other dischargers. Nothing in the act suggests this result, however. Section 402(b), in authorizing states to develop permit programs, provides no exemption for federal dischargers from such programs. 33 U.S.C. (Supp. III) § 1342(b). Nor does that section authorize the Administrator, in approving a state permit program, to withhold approval to the extent that the program is applicable to federal dischargers. *Ibid.* Further, section 402(c), in directing the Administrator to suspend his own permit program upon approval of a state program, does not authorize the Administrator to continue his permit program with respect to federal dischargers. *Id.* at § 1342(c). Thus, there is no authority whatsoever in section 402, or elsewhere in the act, for the dual permit program proposed by the petitioner. That section clearly contemplates that *all* dischargers—including federal dischargers—shall be subject to state permit programs adopted under the act.

If any confirmation of our conclusion is necessary, it is found in section 313, which requires federal dischargers to comply with federal and state "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." 33 U.S.C. (Supp. III) § 1323.[14] The section, in requiring compliance with state "requirements" respecting the "control and abatement" of pollution, obviously includes permits issued by the states under section 402(b), for such permits are the primary means by which water pollution is to be controlled under the act.[15] In requiring such compliance "to the same extent

14. Section 313 provides in full:

"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

15. The Senate report, in commenting on section 402, stated:

"[T]he most effective *control* mechanism for point sources

that any person is subject to such requirements," the section obviously insures that federal dischargers will be subject to the same permit program as other dischargers; this reference confirms the lack of authority for the dual permit program proposed by the petitioner. Nothing in section 313 supports the petitioner's claim that the section only includes "substantive" requirements, not "procedural" requirements; by definition, both terms are subdivisions of the word "requirements," and hence encompassed within the statutory phraseology. Thus, section 313, rather than imposing an obligation on federal dischargers independently of other provisions of the act, confirms and clarifies the obligation of such dischargers to comply with permit programs adopted by the states under section 402(b). The section was intended to forestall any claim, such as that asserted by the petitioner here, that federal dischargers are exempt from such programs.[16]

The petitioner asserts, however, that section 313 is only intended to require federal dischargers to comply with those state "requirements" authorized under section 303(e) of the act, 33 U.S.C. (Supp. III) § 1313(e). Brief for the Petitioners (hereinafter "Pet. Brief"), 18. That section, as we have seen, authorizes states to retain their pre-1972 authority to adopt ambient "water quality standards,"

of discharge is one which will provide for the establishment of conditions of effluent *control* for each source of discharge. A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program." S. Rep. No. 92-414, 92d Cong., 1st Sess. 72 (1971), 2 *Legis. Hist.* 1490. (Emphasis added.)

16. Section 313 also requires compliance by federal dischargers with other types of permits, licenses and control measures issued by the states for the prevention of water pollution, in addition to NPDES permits issued under section 402(b). See n. 23, *infra*.

which are defined in the section as including effluent "limitations" and "standards" under the new act. The terms "effluent limitations" and "standards" are used in a precise and artful sense in the act; these terms denote authority given to the Administrator in sections 301, 302, 303, 306 and 307, and authority given to the states in section 303(e) —repeated in sections 510 and 301—to adopt more stringent "limitations" and "standards" than those of the Administrator.[17] If Congress had intended to limit section 313 to such "limitations" and "standards," it would have employed those terms, or at least made reference to those sections. Instead, by using the broader phrase "requirements respecting control and abatement of pollution," Congress clearly intended to reflect the states' broader authority to adopt NPDES permit programs under section 402. Indeed, in view of the importance which Congress attached to such programs in achieving the act's goals, it would be anomalous to read section 313 as precluding reference to such programs. Hence, the phraseology of the section contradicts the interpretation suggested by the petitioner.

Our conclusion is also supported by the history of section 313. That section succeeded section 21(a) of the pre-

17. Section 301 authorizes the Administrator to develop "effluent *limitations*" at selected target dates, and subdivision (b)(1)(c) thereof authorizes the state to develop more stringent "effluent *limitations*." 33 U.S.C. (Supp. III) § 1311(b). Section 302 authorizes the Administrator to develop "effluent *limitations*" for specific bodies of water. *Id.* at § 1312. Section 303, and particularly subdivision (e) thereof, authorizes the states, subject to the Administrator's approval, to develop "water quality *standards*," including "effluent *limitations*." Id. at §§ 1313(a), 1313(e). Section 306 authorizes the Administrator to develop "national *standards* of performance" for new sources of water pollution. *Id.* at § 1316. Section 307 authorizes the Administrator to develop "toxic and pretreatment effluent *standards*." *Id.* at § 1317. Section 510 authorizes the states to develop a more stringent "*standard*" and "*limitation*" than those of the Administrator. *Id.* at § 1370. (All emphasis has been added.)

1972 act, which required federal dischargers to comply with state "water quality standards." 84 Stat. 91, 107 (1970).[18] Since the states' pre-1972 authority to adopt "water quality standards" was preserved by section 303(e), section 21(a) need not have been changed if—as contended by the petitioner—the 1972 amendments were intended only to preserve the obligation of federal dischargers to comply with state "water quality standards." Hence, by changing the focal reference from "water quality standards" in section 21(a) to "requirements" in section 313, Congress clearly indicated its intent that the latter section is not limited to "water quality standards" adopted by the states under section 303(e).

C. The Administrator's Authority to Issue Permits to Federal Dischargers Is Based on the Same Provisions Which Provide Such Authority to the States, and Thus the Administrator Has No Greater Authority Than the States to Issue Such Permits.

The petitioner, in asserting that the "requirements" described in section 313 do not include permits issued under section 402, overlooks the fact that this result would free federal dischargers from *any* permit control under the act, whether exercised by the states *or* the Administrator. The Administrator's authority to issue permits to federal dischargers, in states where he operates his own permit program, is based on sections 402 and 313, the same provisions which provide such authority to the states. Section 402(a) gives the Administrator his authority to operate a permit program, and section 313 requires compliance by federal

18. Although section 21(a) made no specific reference to the authority of the states, the legislative history of the section indicates that state as well as federal "standards" were included within its ambit. H.R. Rep. No. 91-127, 91st Cong., 2d Sess. 19 (1970); *California v. Davidson*, 3 E.R.C. 1157 (N.D. Cal. 1971); *California v. Department of the Navy*, 371 F. Supp. 82, 83 (N.D. Cal. 1973) (dictum).

dischargers with state *and* federal "requirements." Nothing in these sections distinguishes between the authority of the Administrator and the states, with respect to the issuance of permits to federal dischargers. The distinction between their authority depends solely on whether the Administrator has approved a state permit program, not on the identity of the discharger. Hence, the Administrator's authority to issue permits to federal dischargers is based on the identical provisions which provide such authority to the states, and he has no greater power to issue such permits—in states where he operates his own permit program—than the states have elsewhere.

Thus, the Administrator faces an unenviable dilemma, which he has yet to even acknowledge. Either the word "requirements" in section 313 includes permits issued under section 402, or it does not. If it does, then the states have authority to issue permits to federal dischargers. Otherwise, the word "requirements" would be given a varying meaning, depending on whether the permits are issued by the states or the Administrator. Nothing in the act supports such a whimsical, vagarious construction of that term.

On the other hand, if the word "requirements" in section 313 does *not* include permits issued under section 402, federal dischargers would not be bound to comply with permits issued by the states *or* the Administrator. This result would give such dischargers the option of voluntarily complying with the act's permit system, an option which was clearly not intended by the 1972 amendments. In fact, Congress took particular note of the unresponsiveness of federal dischargers to the nation's water quality goals, and the need to strengthen—not weaken—controls over such dischargers. S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. To assure that federal dischargers comply with the NPDES system, section 313 specifically directs such dischargers to comply with state and federal requirements "to the same extent that any person is subject to such requirements." Thus, such dischargers must comply with systems operated by the states—in instances where the Administrator has approved such systems—as fully as they must comply with systems operated by the Administrator. The petitioner, by distinguishing between "requirements" in section 313 and permits issued under section 402, has ignored the double-edged implications of such a distinction.

D. Other Statutory References Indicate That the Word "Requirements" in Section 313 Includes Permits Issued Under Section 402.

In sections 505, 510 and 313 itself, Congress has provided further indications of the interrelationship between the word "requirements" in section 313 and permits issued under section 402.

1. *Section 505.* Section 505(f), which provides for citizen suits to enforce the act, describes an "effluent standard or limitation" as including "a *permit* or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a *requirement* applicable by reason of section 313 of this Act)." 33 U.S.C. (Supp. III) § 1365(f). (Emphasis added.) This provision *expressly* equates a "requirement" in section 313 with a permit issued under section 402, and thus clearly contradicts the petitioner's argument that the two sections are mutually exclusive.

We are unable to understand the petitioner's discussion of section 505(f). He first points out that the reference to a "requirement" in that section appears at the end of a list of six categories—the last of which is a "permit" issued under section 402—which may be enforced by a citizen suit. Pet.

Brief, 31-32. He then argues, apparently, that since not all of the first five categories can be classified as a "requirement," the sixth category cannot be so classified either. *Ibid.* His conclusion, aside from the fact that it is a *non sequitur,* is based on a misreading of the section. The word "requirement" in the sixth category does not refer to all, or even any, of the first five categories, but only refers to a "permit" described in the sixth category.[19] In other words, the word "requirement" is intended to clarify the meaning of the sixth category, not the preceding five. Thus, section 505(f), on its face, explicitly reads section 313 into section 402.[20]

2. *Section 510.* Section 510, in describing the extent of state authority under the act, specifically distinguishes between a "standard or limitation" in subdivision (1)(A), and a "requirement respecting control or abatement of pollution" in subdivision (1)(B). 33 U.S.C. (Supp. III) § 1370.[21] The reference to a "standards or limitation" obviously connotes those "standards" and "limitations" described elsewhere in the act. Hence, the reference to a "requirement respecting control or abatement of pollution" in section 510 —which is similar to the phrase appearing in section 313— obviously connotes more than such "standards" and "limitations." Thus, section 313 is not limited to the "standards" and "limitations" described elsewhere in the act, but also includes permits issued under section 402.

The petitioner argues, however, that the word "requirement" in section 510 has a different meaning than the word "requirements" in section 313. Pet. Brief, 22-23. He points out that the word "requirements" in section 313 inferentially *includes* the "standards" and "limitations" described elsewhere in the act, and that the word "requirement" in section 510 is differentiated from, and hence arguably *excludes,* such a "standard" or "limitation." *Ibid.* He concludes that section 510, so interpreted, sheds no light on the meaning of section 313.

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19. Section 505(f) provides in full:

"For purposes of this section, the term 'effluent standard or limitation under this chapter' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this title; (2) an effluent limitation or other limitation under section 301 or 302 of this title; (3) standard of performance under section 306 of this title; (4) prohibition, effluent standard or pretreatment standards under section 307 of this title; (5) certification under section 401 of this title; or (6) a permit or condition thereof issued under section 402 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 313 of this title)."

20. The petitioner also claims that section 505(f) is "borrowed directly" from section 304(f) of the air act, 42 U.S.C. § 1857h-2(f). Pet. Brief, 31. However, the petitioner fails to note that the provision in the air act contains no reference to a "permit," but merely defines a "requirement" as included within a "control or prohibition respecting a motor vehicle fuel or fuel additive." Thus, whatever the other similarities between these provisions in the water and air acts, the provision in the water act expressly ties a "requirement" to a "permit," and the air act does not.

21. Section 510 provides in full:

"Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

The petitioner's argument ignores both the language and purposes of section 510, however. The purpose of the section is to insure that the act will not be construed as preempting the states from adopting "standards," "limitations" and "requirements" at least as stringent as those otherwise provided in the act.[22] Thus, the disjunctive reference to a "standard or limitation," and a "requirement respecting control or abatement of pollution," assures that the states retain the power to impose higher "standards" and "limitations" than those imposed by the Administrator under sections 301, 302, 303, 306 and 307, as well as higher "requirements"—in the form of permits, licenses and other forms of pollution control—than those imposed by the Administrator or the states under the NPDES system established by section 402(b).[23] By making specific reference

22. The report of the House of Representatives commented on section 510 as follows:

> "The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices." H.R. Rep. 92-911, 92d Cong., 2d Sess. 136 (1972), 1 *Legis. Hist.* 823.

23. The NPDES system established by section 402 is limited to the "discharge of a pollutant," 33 U.S.C. (Supp. III) §§ 1342(a)(1), 1311(a), a phrase defined in the act as a discharge into navigable waters from a "point source," such as a pipe or outfall. *Id.* at § 1362 (12). This term is differentiated in the act from "pollution," which is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* at § 1362(19). Hence, although the phrase "discharge of a pollutant" is limited to point source discharges, the word "pollution" is not so limited, but also includes, for example, runoffs from agricultural lands.

Section 510, in subdivision (1)(B), uses the word "pollution" rather than the phrase "discharge of a pollutant," thus insuring

to a "standard or limitation" in section 510, Congress sought to forestall arguments by those who might argue that the states may adopt systems—such as permit or licensing systems—to prevent water pollution which is not caused by point source discharges. Section 313 also uses the word "pollution" rather than the phrase "discharge of a pollutant," thus insuring that federal agencies must comply with such state systems. If Congress had intended otherwise, it certainly would have so expressed its intention in section 313, rather than using a general phrase—"requirements respecting control and abatement of pollution"—virtually identical to that appearing in section 510. Thus, section 313 requires federal compliance with state programs adopted under both sections 402(b) and 510.

This conclusion is also supported by the legislative history of section 313. According to that history, the section is "similar to one in existing law," a reference to section 21(a) of the pre-1972 act. 84 Stat. 91, 107 (1970); S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. Since section 21(a) antedated the passage of the 1972 amendments, which initiated the NPDES permit system, that section obviously required federal compliance with state control measures other than NPDES programs, and two federal district courts in California have so held. See *California v. Davidson*, 3 E.R.C. 1157 (N.D. Cal. 1971); *California v. Department of the Navy*, 371 F. Supp. 82, 83 (N.D. Cal. 1973) (dictum); cf. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 331 n. 3 (1973) ("requirements" in section 311 of the water act held to include a state "licensing" system different from the NPDES system).

This issue is important in states which, although not operating their own NPDES programs, operate other permit or licensing systems designed to control "pollution," and seek to require federal agencies to comply with such programs. This issue is also important, however, in states which operate their own NPDES programs, and seek to control "pollution" that does not result from point source discharges. For instance, California presently seeks to require a federal agency, the U. S. Bureau of Reclamation, to comply with conditions—designed to prevent "pollution" resulting from salinity intrusion—imposed by California in permits issued to the federal agency to appropriate water for reclamation purposes in California. Since salinity intrusion does not result from a point source discharge, an NPDES permit is not required for such an appropriation of water. However, salinity intrusion clearly results in "pollution" within the act's meaning. This conclusion appears from Senator Muskie's remarks during the congressional debates to the effect that "it is the intent of the conferees and of the bill that such salt water intrusion is pollution as defined in section

that the word "requirement" does not include those terms, that the word should be construed—in the manner urged by the petitioner here—without reference to its common and ordinary meaning. Congress' intent to provide such clarity should not be construed as a basis for interpreting the effect of sections 510 and 313 differently. Its effort to *strengthen* the states' authority in section 510 should not be used to *limit* their authority in sections 402 and 313. Hence, the word "requirement" in section 510 clearly means the same thing as the word "requirements" in section 313. It is not without significance that the petitioner, although disagreeing with this interpretation, has failed to provide an alternative meaning of the word "requirement" in section 510.

3. *Section 313.* Section 313, after describing the obligation of federal dischargers to comply with state "requirements," provides a clarifying example by using the phrase "including the payment of reasonable service charges." 33 U.S.C. (Supp. III) § 1323. The clear meaning of the phrase is that Congress intended to authorize federal dischargers to pay fees to a state for permit applications, such as applications for permits under section 402(b).[24] Such fees con-

502 of the bill." 118 Cong. Rec. 16894, 92d Cong. 2d Sess. (1972). Hence, California may require a permit for the appropriation of such water pursuant to its broader powers in sections 510 and 313. This issue is now in litigation in a federal district court in California. See *State of California v. Morton,* S-2924 (E.D. Cal.). The Court need not address this issue in this case, of course, as this case only involves the authority of the states to apply their NPDES programs to federal dischargers.

24. Our construction of the phrase is supported by a recent statement of Senator Howard Baker, a member of the Senate Committee on Public Works which drafted the water act. Senator Baker stated:

> "It is my recollection that the language on payment of such charges was intended to authorize Federal agencies' compliance with such requirements even if, for example, this meant that an agency had to pay a charge or fee to a State as part of a requirement that the agency obtain a State effluent permit under section 402 of the act." 120 Cong. Rec. S 16644 (daily ed. Sept. 16, 1974).

tain certain characteristics of a tax, and a state is without power to levy a tax on federal agencies in the absence of congressional authorization. See, *e.g., United States v. Allegheny County,* 322 U.S. 174 (1944); *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886). Congress intended to assure such authorization by inserting the clarifying phrase in section 313.[25]

The petitioner argues, however, that the phrase was inserted in section 313 only to authorize federal dischargers to pay charges to local agencies attendant to the collection and treatment of sewage from federal facilities. Pet. Brief, 24. Such charges are voluntarily incurred by the federal discharger as the result of an agreement with the local agency for sewage services; in the absence of such an agreement, a federal agency is not under an obligation to accept such services, nor a local agency under an obligation to provide such services. There can be no question of the authority of federal agencies, aside from the effect of section 313, to pay for services which they voluntarily receive under an agreement. Hence, as the Ninth Circuit properly noted, the petitioner's interpretation of the phrase in section 313 would render it superfluous. 511 F.2d at 970.

25. Federal dischargers have applied for permits from California's water agencies for several years prior to the passage of the 1972 amendments, and have paid the filing fees required by California law. Appendix, 37, 40, 41. Congress may have been aware of this administrative practice, and intended to codify it by inserting the "reasonable service charges" phrase in section 313.

The petitioner concedes that it "might have been unnecessary" for Congress to authorize federal dischargers to pay charges to local agencies for sewage services. Pet. Brief, 24. However, he suggests that Congress, by authorizing only the payment of service charges which are "reasonable," may have inserted the phrase to prevent local agencies from assessing *unreasonable* service charges on federal dischargers. *Id.* at 24-25. This interpretation overlooks the fact that local agencies cannot impose *any* service charges on federal dischargers for sewage services, whether reasonable or not, unless such dischargers seek such services and agree to such charges. Hence, there is no need for legislation to protect such dischargers from "unreasonable" service charges.

Moreover, the petitioner's interpretation is inconsistent with the basic purpose of section 313. The section, in directing that federal dischargers "shall" comply with state requirements to the same extent that others are "subject" to such requirements, *obligates* federal dischargers to comply with certain state laws, rather than *protects* them from this obligation. The purpose of the section was to combat the unresponsiveness of such dischargers to the nation's water quality goals, not the states' efforts to meet those goals. S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. It can hardly be suggested that the section, or any part thereof, was intended to relax the restraints imposed on federal dischargers under the act.

E. Exemptions for Federal Dischargers from State Programs Adopted Under Sections 308 and 306 Do Not Extend to State Permit Programs Adopted Under Section 402(b).

The petitioner argues that the states are unable to develop permit programs with respect to federal dischargers which meet the standards set forth in section 402(b). Pet. Brief, 25-29. That section requires, as a condition of the Administrator's approval of a state permit program, that

the state have "adequate authority," *inter alia,* to "apply, and insure compliance with," the provisions of sections 308 and 306, and to "inspect, monitor, enter and require reports" under section 308. 33 U.S.C. (Supp. III) §§ 1342(b)(1)(A), 1342(b)(2)(B). Section 308, which authorizes the Administrator to inspect, monitor and enter a discharger's facilities in enforcing certain provisions of the act, *id.* at § 1318, also authorizes the states to develop procedures for inspection, monitoring and entry, but exempts federal dischargers from such procedures. *Id.* at § 1318(c). Section 306, which authorizes the Administrator to develop "national standards of performance" for new sources of water pollution, *id.* at § 1316, authorizes the states to develop a procedure for applying and enforcing such standards, but exempts federal dischargers from such a procedure. *Id.* at § 1316(c). Since, concludes the petitioner, the states are unable to develop permit programs for federal dischargers which meet the standards of section 402(b), Congress did not intend for the states to apply such programs to federal dischargers.[26]

However, the petitioner's argument is unsupported by the language, purposes or legislative history of section 402(b). That section authorizes a state program entirely different from the programs authorized under sections 308 and 306. The fact that Congress provided an *express* exemption for federal dischargers under the latter sections shows that Congress knew how to exempt such dischargers from state programs. The fact that no similar exemption was expressly provided for federal dischargers from state permit programs under section 402(b) shows that no such

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26. The petitioner notes that the Ninth Circuit, in the decision below, failed to consider this argument. Pet. Brief, 26 n. 55. The petitioner fails to note, however, that he failed to present this argument to the Ninth Circuit.

exemption was intended. Cf. *Continental Casualty Co. v. United States,* 314 U.S. 527, 533 (1942). If Congress had intended to exempt such dischargers from state permit programs, it would undoubtedly have so provided with the clarity which appears in sections 308 and 306. Thus, the fact that exemptions were expressly given to federal dischargers in the latter sections strengthens—not, as concluded by the petitioner, weakens—the conclusion that a similar exemption was not intended under section 402(b). Therefore, although states may not independently monitor federal facilities under section 308, or develop new source performance standards for federal dischargers under section 306, they can acquire similar authority under section 402(b) in instances where their permit program is approved by the Administrator.

It can hardly be suggested that Congress' failure to provide an express exemption for federal dischargers in section 402(b) is the product of accident rather than design. The NPDES permit system conceived in that section is the central mechanism by which the act's objectives are to be achieved, as we have seen. Moreover, the programs authorized under sections 308 and 306, and the exemptions for federal dischargers from such programs, are patterned after identical programs and exemptions found in the air act. See 42 U.S.C. §§ 1857c-6(c), 1857c-9(b). However, the air act does not provide for a program similar to the NPDES permit program found in the water act. This strengthens the inference that a state NPDES program, which is the major innovation of the 1972 amendments to the water act, is fully applicable to federal dischargers.

In fact, the language of section 402(b) itself fails to support the petitioner's position. That section requires, as a condition of the Administrator's approval of a state permit program, that the state have "adequate authority" to issue

permits which insure compliance with the requirements of sections 308 and 306. 33 U.S.C. (Supp. III) § 1342(b). The quoted reference is clarified by the language of the preceding sentence, which requires that "the laws of such State" provide "adequate authority" to carry out the program. *Ibid.* Thus, the section does not require that the state have independent authority under sections 308 and 306 to operate programs under those sections. Rather, the section only requires that *state law itself* provide authority to the appropriate state agency to operate such programs, as part of the NPDES program. The language relied on by the petitioner was merely intended to require the state to build certain features into its permit structure, not to limit the size or scope of the structure. It was intended only to require a state program to attain a minimum level of acceptability, not to impose a maximum level of authority.[27]

If any confirmation of our view is necessary, it is found in the legislative history of section 402(b) itself. That section, as originally passed by the House of Representatives, expressly exempted federal dischargers from the states' authority under an approved NPDES program to "inspect, monitor, enter and require reports" under section 308. H.R. 11896, 92d Cong., 2d Sess. § 402(a)(5) (1972), 1 *Legis. Hist.* 1054. However, this exemption was eliminated by the Conference Committee, and was omitted from the bill which

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27. This conclusion is also supported by the House Report, which discussed section 308 as follows:

> "The individual States participating in the permit program authorized by section 402 are required by section 402 to have the authority to inspect, monitor, enter, and require [reports] to at least the same extent as required in section 308. Such State actions are not a delegation of Federal authority." H. R. Rep. 92-911, 92d Cong., 2d Sess. 114, 1 *Legis. Hist.* 801.

The report thus makes clear that the reference in section 402(b) to section 308 is not an incorporation of the limitation included in the latter section, but a reference to the powers necessary under state law for approval of an NPDES permit system.

Congress finally approved.[28] The House—in exempting federal dischargers from *one* of the elements required to be included in a state permit program—clearly intended for such dischargers to be subject to the remaining elements, including the element relating to new source performance standards under section 306. More importantly, the Conference Committee—in removing the exemption—clearly intended for such dischargers to subject to *all* elements of a state permit program.

Congress' decision to give the states authority under section 402(b) which they independently lack under sections 308 and 306, is based on sound public policy. The primary purpose of allowing a state to enter federal facilities, monitor federal operations and inspect federal records is to allow the state to acquire information in issuing, administering and enforcing NPDES permits applicable to federal dischargers.[29] Thus, there is

28. As originally passed by the House, section 402(b)(2)(B) provided that, as a condition for the Administrator's approval of a state permit program, the state must have authority, "except with respect to sources owned or operated by the United States, to inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act." H.R. 11896, 92d Cong., 2d Sess. § 402(b)(2)(B) (1972), 1 *Legis. Hist.* 1056. The Conference Committee subsequently noted, in commenting on that section:

> "Subsection (b)(2)(B) is revised to remove the exception for federally-owned and operated point sources from inspection, monitoring and reporting requirements." Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 139 (1972), 1 *Legis. Hist.* 322.

29. The House report noted that the purpose of such monitoring was "basically for control of the discharge of pollutants and not the gathering of data," and that the right to inspect "is limited to control of discharge of pollutants and not data gathering per se." H. R. Rep. 92-911, 92d Cong., 2d Sess. 114 (1972), 1 *Legis. Hist.* 801.

Further, the Administrator concedes that federal dischargers "are required to provide states with whatever data are needed for standard setting." Pet. Brief, 30 n. 60.

little reason to give a state such control over federal dischargers if the Administrator—rather than the state—administers the NPDES permit program in that state. The same reason does not apply, however, in instances where the state operates its own NPDES program. It would be difficult for a state to effectively administer its NPDES program if it lacks authority over a class of dischargers—federal dischargers—which, according to the act's legislative history, have been notoriously unresponsive to the nation's water quality goals.[30] Moreover, as we shall discuss fully below, the specific procedures which the states must follow in adopting, administering and enforcing their NPDES programs limit the extent to which they can interfere with federal operations. For these reasons, Congress wisely chose not to exempt federal dischargers from state NPDES programs, as it exempted such dischargers from lesser state programs under the act.[31]

30. See quotation in text on page 53, *infra*.

31. The petitioner also notes that federal dischargers are exempt from section 401(a) of the water act, which requires applicants for federal licenses and permits—if such authorize discharges into navigable waters—to secure a certification from the state that the discharge will be in compliance with certain provisions of the act. 33 U.S.C. (Supp. III) § 1341(a). The section also provides that the Administrator shall give such a certification in instances where the state lacks authority to do so. *Ibid.* The petitioner does not claim that a state certification under section 401(a) is a necessary requisite of a state-issued permit under section 402(b), but only that the programs authorized by the sections are "analogous." Pet. Brief, 33. However, the fact that Congress expressly exempted federal dischargers from the states' authority to issue certifications under section 401(a), and expressly gave such authority to the Administrator, demonstrates anew that Congress knew how to exempt such dischargers from state control. Hence, the exemption in that section strengthens the conclusion that no such exemption was intended under section 402(b). Thus, the exemption for federal dischargers in section 401(a) is another example of the limitations, such as those also found in sections 308 and 306, which Congress placed on states which do not administer their own permit programs under section 402(b).

F. The Petitioner's Distinction Between "Substantive" and "Procedural" Requirements Is Administratively Unworkable, and Not Supported by the Act.

The weakness of the petitioner's theory of this case is particularly apparent in its actual operation. He concedes that the states may impose "substantive" requirements—in the form of "effluent limitations"—against federal dischargers, but denies their authority to subject such dischargers to "procedural" requirements, such as permits issued under section 402(b). This suggested distinction ignores the fundamental interrelationship between "substantive" and "procedural" requirements under the act, and the extent to which the power to issue the one implies the power to issue the other.

An "effluent limitation" is defined in the act as a restriction imposed by the states or the Administrator on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" discharged from point sources into navigable waters. 33 U.S.C. (Supp. III) § 1362(11). Hence, an "effluent limitation" includes numerical limitations on the quantity and quality of pollutants which may be discharged into receiving waters. Such limitations are to be developed, first, for categories and classes of dischargers by regulations issued by the Administrator or the states, *id.* at §§ 1311, 1312, 1313, 1316, 1317, 1370, and, second, for individual dischargers by the issuance of NPDES permits under section 402, *id.* at § 1342. In fact, section 505(f), as we have noted, describes an "effluent limitation" as including a "permit or condition thereof issued under section 402 of this Act . . . ." *Id.* at § 1365(f). Thus, an "effluent limitation" may even include a permit issued to a discharger, but at least includes limitations on the quality and quantity of effluent discharges inserted as a condition in the permit.[32]

32. Under California's water quality program, such numerical measurements typically include, *inter alia,* maximum and minimum levels of acidity ("pH"), maximum levels of bio-chemical oxygen demand ("BOD") and maximum levels of suspended solids which may be permissibly contained in discharges of effluent by a particular discharger over a particular period of time.

An "effluent limitation" is also defined in the act as "including schedules of compliance." *Id.* at § 1362(11). The latter phrase is in turn defined as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation." *Id.* at § 1362(17). Hence, an "effluent limitation" includes not only numerical limitations on the quantity and quality of effluent discharges, but also time limitations—to be enforced by specific remedial measures—within which such numerical limitations must be met. Since the numerical limitations may be inserted as conditions in a permit, the time limitations may also be so inserted. Thus, the petitioner, by conceding the states' authority to develop "effluent limitations" applicable to federal dischargers, concedes the states' authority to formulate conditions—relating both to numerical and time limitations—for permits issued to such dischargers.

The states' authority to formulate such conditions implies authority to administer its conditions as well. Otherwise, a state would be unable to change its conditions in light of changed circumstances, such as a change in the quality of the effluent discharge or of the receiving waters. If a state lacked flexibility to thus change its conditions, it would have no recourse but to bring a legal action whenever the conditions were violated. Thus, to deprive a state of its administrative remedies, in instances when federal dischargers violate conditions formulated by the states, would limit the state to pursuit of its judicial remedies. This result would, of course, promote litigation between state and federal agencies, rather than promote reconcilia-

tion of their differences by administrative means. Hence, the states clearly have authority not only to formulate conditions applicable to federal dischargers, but to administer such conditions as well.

The authority to formulate and administer such conditions clearly implies authority to conduct an administrative hearing for that purpose. Such a hearing enables the state to evaluate the many factors—such as the nature of the activity resulting in the effluent discharge and the nature of the receiving waters—that bear upon the numerical limitations to be included as such conditions. For instance, discharges from a lumber mill create different problems than discharges from a municipality providing sewage service to a large metropolitan area; discharges into a shallow, interior stream create different problems than discharges into the ocean. Further, such a hearing enables the state to evaluate other factors—such as the discharger's capacity to meet these numerical limitations—which bear upon the time limitations to be included as conditions in the permit. Finally, such a hearing enables the state, in instances when its limitations are violated, to ascertain the precise reasons for the violation, thus assisting the state in determining what course of action to take in administering the limitations.

Thus, a federal discharger, unfettered by the obligation to participate in administrative hearings conducted by the state, could prevent the state from acquiring, or even knowing of, information relevant to the formulation and administration of "effluent limitations," notwithstanding the petitioner's concession that such dischargers are subject to such limitations.[33]

33. The impracticality of the petitioner's position becomes particularly apparent when viewed in light of California's NPDES program, the first to be approved by the Administrator. Cal. Wat. Code §§ 13370-13389 (Supp. 1975). Under California's program, any person who discharges, or proposes to discharge, pollutants into navigable waters in California must submit a report of the discharge to the appropriate regional water quality control board. *Id.* at § 13376. Thereafter, the board conducts a hearing to determine whether, and under what conditions, to issue "requirements," the equivalent of a permit, to the discharger. *Id.* at §§ 13374, 13377-13379. The requirements, which are subject to review every five years, *id.* at § 13380, must insure compliance with the effluent limitations and standards contained in the federal water act, *id.* at §§ 13377, 13379. If the nature of the discharge changes, the requirements must be modified or terminated. *Id.* at § 13381. If the requirements are violated, the board, after a further hearing, may issue a cease-and-desist order. *Id.* at §§ 13301, 13386(b), 13387(a). If the cease-and-desist order is violated, the board may seek judicial relief. *Id.* at §§ 13385, 13386, 13387. Thus, if the board cannot conduct an administrative hearing in issuing its requirements, it cannot effectively formulate the contents of such requirements. If, when its requirements are violated, it cannot conduct an administrative hearing in issuing a cease-and-desist order, it cannot adapt its requirements to new exigencies, and thus cannot effectively administer its requirements.

The petitioner argues, however, that section 313 is "silent" as to how the states are to formulate and administer conditions for permits issued to federal dischargers, and thus that such dischargers need only "cooperate" with the states by supplying such information as, in the opinion of the discharger, is sufficient for that purpose. Pet. Brief, 30 n. 60.[34] Section 313, however, is not "silent" on this subject, but rather—by requiring federal dischargers to comply with state requirements "to the same extent that any person is subject to such requirements"—requires federal dischargers to participate in administrative hearings conducted by the states to the same extent that others must so participate. Since California's NPDES program, which has

34. According to the petitioner, the obligation of federal dischargers to "cooperate" with the states is based solely on an executive order issued by the President, and a federal regulation issued by the Administrator. Pet. Brief, 30 n. 60. Under this interpretation, this obligation could thus be withdrawn at the whim of the President or the Administrator.

been approved by the Administrator, requires all dischargers to participate in such hearings, section 313 imposes the same obligation on federal dischargers in California. In fact, the act specifically authorizes a "public hearing" to be conducted for the purpose of formulating "conditions" in NPDES permits. 33 U.S.C. (Supp. III) § 1342(a).

We thus conclude that the states—through the administrative hearing process—may formulate and administer conditions in permits issued to federal dischargers. Given this conclusion, it would be unwise, from the standpoint of sound administrative practice, to forbid the states to issue the permit which contains such conditions. Otherwise, a federal discharger would be required to go to the state to obtain its conditions, go to the Administrator to obtain its permit, and go back to the state to have its conditions changed. Such an unprecedented bifurcation of the administrative process serves no useful purpose, and is awkward, cumbersome and inefficient. The act provides, to the contrary, that:

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." *Id.* at § 1251(f).[35]

Thus, Congress clearly intended that the authority to formulate and administer conditions in a permit, and the

35. Additionally, the House report commented on section 402 as follows:

> "A system of permits which requires duplicative effort or destroys the initiative of the States and local governments is wasteful and non-productive." H.R. Rep. No. 92-911, 92d Cong,. 2d Sess. 125 (1972), 1 *Legis. Hist.* 812.

authority to issue the permit itself, would reside in the same agency.

In fact, the petitioner, in urging a bifurcation of the administrative process, does not defend this result as consistent with sound administrative practice. Rather, he argues that the authority to issue a permit—as contrasted with the authority to conduct an administrative hearing—enables the state to acquire "control" over federal dischargers, and that this result is inimical to the doctrine of sovereign immunity. Pet. Brief, 30 n. 60. We will fully explore below the extent to which Congress, rather than forbidding such state "control," tightly circumscribed it by providing limited exemptions for federal dischargers from state permit programs, and by imposing restrictions on the states in the adoption, administration and enforcement of such programs. For the moment, however, we need only note that whatever "control" a state acquires over federal dischargers under the act derives from their authority to formulate and administer conditions in permits issued to federal dischargers, not their authority to issue the permit itself. The conditions in such permits—relating to the numerical and time limitations applicable to the discharger—define the nature of the discharger's obligation. Thus, the issuance of the permit itself is merely a ministerial act. If a state may define the nature of the obligation for federal dischargers—as conceded by the petitioner—it acquires no greater "control" over such dischargers by performing the ministerial act of issuing a permit describing the obligation. If the doctrine of sovereign immunity has been waived sufficiently to allow the states to determine the steps which must be taken by federal dischargers in controlling water pollution, there is no reason to retain the doctrine with respect to the issuance of a permit setting forth those steps.

Hence, the petitioner's distinction between "substantive" and "procedural" requirements, which must be rejected for sound administrative reasons, is not supported by any constitutional reasons.

Since the petitioner concedes the states' authority to develop the "substantive" contents of permits issued to federal dischargers, one might wonder why the parties in this case are so concerned about the states' ministerial authority to issue the permit itself. The answer lies in the fact that the petitioner—by seeking to deprive states, such as California, of authority to conduct administrative hearings for federal dischargers—is seeking to deprive such states of the means to formulate and administer the conditions which comprise the "substantive" contents of the permits. Hence, the petitioner, although conceding in theory the states' authority to impose conditions, seeks in practice to deny the states the benefit of that concession. The petitioner apparently seeks to create a *de facto* void which he hopes to fill by formulating and administering his own conditions. In fact, many federal dischargers in California, endorsing the petitioner's interpretation of the act, are now refusing to comply with *any* conditions imposed by California.[36] Thus, this case, rather than presenting a narrow procedural question, presents the broad question whether the states or the Administrator will be primarily responsible for controlling water pollution by federal agencies. Congress has already answered this question, by directing such agencies to comply with state requirements

36. For instance, the U. S. Air Force operates the Norton Air Force Base and Point Arena Radar Station in California. The Air Force refuses to seek NPDES permits from California in discharging waste from the bases into California's waters. The Administrator has issued permits for discharges from both bases, and has refused to insert conditions in the permits as requested by California's water quality control board. Appendix, 37, 41, 47, 51.

"to the same extent that any person is subject to such requirements. . . . " 33 U.S.C. (Supp. III) § 1323. The petitioner, by seeking to expand his power at the expense of the states, is seeking to circumvent a clear expression of the congressional intent.[37]

G. The Legislative History of the Water Act Does Not Indicate That Federal Dischargers Are Exempt from NPDES Programs Operated by the States Under Section 402(b).

We thus conclude that nothing in the water act, viewed in light of its language, structure and objectives, supports the petitioner's claim that federal dischargers are exempt from permits issued by the states under section 402(b). However, the petitioner argues that his claim is supported by the act's legislative history. He notes that the congressional committee reports preceding the act's passage, in describing the effect of section 313, made reference to "effluent limitations," "other limitations," "effluent standards"—and even "requirements"—but made no reference to permits issued under section 402(b). H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118-119 (1972), 1 *Legis. Hist.* 805-806; S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485; Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 135 (1972),

37. We are baffled by the petitioner's additional argument that section 505, which authorizes suits by private citizens to enforce the act, also provides authority for the states to enforce their effluent limitations against federal dischargers, and that in this way Congress took care of the "loophole" caused by the states' inability to enforce their permits against such dischargers. 33 U.S.C. (Supp. III) § 1365; Pet. Brief, 30 n. 61. The act contains no such "loophole" except under the petitioner's interpretation. Section 402(b)(7) authorizes the states to adopt procedures for the enforcement of their permit programs, including procedures for abatement and for civil and criminal penalties. 33 U.S.C. (Supp. III) § 1342(b)(7). Therefore, the act contemplates that the states will enforce their effluent limitations by enforcing their own permits under section 402(b)(7), not that the states will enforce their limitations by the remedies made available to private citizens in section 505.

1 *Legis. Hist.* 318; Pet. Brief, 34-38. According to the petitioner, this shows that the states lack authority to issue permits to federal dischargers under the act.

A more accurate analysis of these reports, however, warrants the conclusion that the reports are silent with respect to the issues in this case. The random scraps of terminology collected by the petitioner reveal only that federal dischargers are subject to effluent limitations issued by the states, not whether such dischargers must comply with permits issued by the states in achieving that objective. Thus, the reports summarize the act's goals, and do not spell out the method by which these goals are to be attained. In the words of the Fifth Circuit, in considering similar reports relevant to the air act, the reports are "more accurately read as a statement of the ultimate goal of the provision rather than as a road map of how to get there." *Alabama v. Seeber,* 502 F.2d 1238, 1246 (5th Cir. 1972), *cert. pending,* No. 75-851.

In fact, the references to "effluent limitations" in the committee reports imply the power to issue a permit, rather than the opposite. We have already noted that the authority to issue such limitations is equivalent to the authority to impose conditions in a permit, which in turn implies authority to issue a permit. These powers are so fundamentally interrelated, so vitally linked in the functioning of a continuous and ongoing process, as to be incapable of the facile distinction urged by the petitioner. In fact, section 505(f), which describes an "effluent standard or limitation" as including a permit issued under section 402, 33 U.S.C. (Supp. III) §1365(f), perhaps indicates the sense in which the committee reports made reference to "effluent limitations" and "standards." In any event, whether these terms *include* a permit, they clearly *imply* the issuance of a permit.

H. The Administrator's Interpretation of the 1972 Amendments Is, of Itself, Not Entitled to Weight in Construing the Meaning and Effect of the Amendments.

A well-established rule of statutory construction requires weight to be given to a long-standing interpretation of a statute by the agency charged with its enforcement. See, *e.g., Zemel v. Rusk,* 381 U.S. 1 (1965); *Udall v. Tallman,* 380 U.S. 1 (1964). The petitioner argues that his position, which is supported by a regulation issued by the Administrator, 40 C.F.R. § 125.2(b) (1973), thus gains force from this rule of construction. Pet. Brief, 39-40.

However, this rule of construction has no significance in this litigation.[38] First, the purpose of the rule is to give weight to an administrative interpretation rendered contemporaneously with the statute's passage, or an interpretation which has been unchallenged for such a period of time as to justify the conclusion that the interpretation corresponds with the congressional intent. 2A *Sutherland, Statutory Construction* (4th ed.) 251-252, 255. Here, however, the Administrator issued his regulation substantially after the passage of the 1972 amendments, the regulation was immediately challenged by the states in this litigation and comparatively little time has elapsed since the regulation was issued.[39] Second, the Administrator's regulation

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38. The interpretation of Senator Howard Baker, a member of both the Senate and conference committees which considered the bills which were finally enacted, is obviously entitled to more weight than that of the Administrator, and the senator's interpretation supports the position of the states in this case. See n. 24, *supra.*

39. The petitioner's citations on this point are inapposite. See Pet. Brief, 40 n. 76. In *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 382 (1969), the Court gave effect to "thirty years of consistent administrative construction left undisturbed by Congress . . . ." Similarly, in *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 420 (1973), the Court gave effect to a "settled administrative policy." In *Zemel v. Rusk,* 381 U.S. 1 (1965), the Court recognized an administrative construction of more than forty years' duration.

was rendered *after* California applied for approval of its NPDES program, and *after* the Administrator approved the program.[40] This sequence suggests that the Administrator's regulation was issued to bolster his position in anticipation of the litigation now before the Court. Third, the states—rather than the Administrator—have the primary responsibility for adopting, administering and enforcing NPDES programs, as we have seen. Thus, the interpretation given by the states to their authority under the water act should, under this rule of construction, carry no less weight than that of the Administrator. Fourth, and most importantly, the issue in this case is of such national importance that it should not be resolved in favor of the petitioner, as against the states, merely because the petitioner says so. For all these reasons, the rule of construction cited by the petitioner, which offers judicial guidance in many cases, offers no such guidance here.[41]

II. The Constitutional Principles Contained in the Supremacy Clause and Plenary Powers Clause Do Not Bar the Issuance of State Permits to Federal Dischargers Under the Water Act, Because the States Are Carrying Out Congressional Policy in the Manner Directed by Congress.

The petitioner argues that this case should be decided in accordance with the traditional principles of federalism con-

40. California applied to the Administrator for approval of its NPDES permit program on February 15, 1973, and provided supplementary information on April 10, 1973. Appendix, 15. The program was approved by the Administrator on May 14, 1973. *Id.* at 18-19. The Administrator issued his regulation, limiting the effect of state NPDES permit programs to non-federal dischargers, on May 22, 1973. 38 Fed. Reg. 13530 (1973).

41. The petitioner also points out that his position is sustained by a presidential executive order. Exec. Order No. 11752, 38 Fed. Reg. 34793-34797 (1973); Pet. Brief, 40 n. 77. However, as noted by the Ninth Circuit, this executive order was issued *after* this litigation had commenced, a sequence which suggests that the executive order was intended to strengthen the petitioner's position in this case. 511 F.2d at 971 n. 13.

tained in the Supremacy Clause and Plenary Powers Clause of the U. S. Constitution, which—in the absence of congressional authorization—prohibit the states from regulating federal activities or federal enclaves. Pet. Brief, 17-20.[42] We do not assert, of course, that the states have power to regulate federal activities on federal enclaves, or elsewhere, in the absence of congressional authorization; rather, we assert that such authorization is found in the water act. We do not, and could not, urge that conflicts between federal and state law be resolved in favor of state law; rather, we urge that no such conflict exists here, that the position of the states in this case is based fully on federal law. Nor does the petitioner claim to perceive any such conflict, given our interpretation of the water act. Rather, he claims only that constitutional principles have *traditionally* operated to bar state regulation of federal activities or enclaves, and that this tradition should be followed in this case in the absence of a clear and unambiguous congressional expression to the contrary. Pet. Brief, 17-20.

42. Under the Supremacy Clause, a state may not interfere with the performance of a federal function, in the absence of congressional authorization. U. S. Const., Art. VI, Cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Johnson v. Maryland*, 254 U.S. 51 (1920); *Ohio v. Thomas*, 173 U.S. 276, 283 (1889); *Mayo v. United States*, 319 U.S. 441, 446 (1943). Under the Plenary Powers Clause, Congress has "exclusive" legislative power over federal enclaves, and a state may not apply its laws on such enclaves in the absence of congressional authorization. U. S. Const., Art. I, § 8, Cl. 17; *Paul v. United States*, 371 U.S. 245, 263 (1963); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937).

However, Congress acquires "exclusive" legislative power over a federal enclave only if the state "consents" to federal acquisition of the enclave, or thereafter "cedes" its legislative authority over the enclave to the federal government. *Paul v. United States, supra* at 264; *James v. Dravo Contracting Co., supra* at 141-142; *Silas Mason Co. v. Tax Comm'n, supra* at 197. Thus, the Plenary Powers Clause does not bar state regulation of a federal enclave in instances where the state has not given such "consent" or otherwise "ceded" its authority. *Ibid.*

We believe, of course, that Congress has clearly and unequivocally indicated that federal dischargers are subject to state permit programs under the act. Moreover, the oft-repeated federal principles cited by the petitioner have traditionally been applied in cases where the state asserted its own inherent, reserved powers to achieve a policy peculiar to the state; the only question in those cases was whether Congress meant to tolerate the exercise of such powers over federal activities or enclaves. For instance, in *Ohio v. Thomas,* 173 U.S. 276 (1889), the state sought to regulate the sale and use of oleomargarine at a federal soldiers' home, pursuant to its police power; the Court rejected the states' position on grounds that Congress did not intend for the state to so apply its laws. These constitutional principles are of less help in this case, however. Here, the states—rather than acting pursuant to their reserved powers to achieve policies set by the states—are acting pursuant to a congressional directive to achieve a national goal set by Congress. The power asserted by the states in this case thus flows from the congressional power, as contained in the water act, not from the states' police powers or other residual powers. Having been enlisted by Congress to spearhead the nationwide fight against water pollution, the states are functioning as Congress' own legions, not as defenders of their own bastions of sovereignty. California seeks only to fulfill its role as an instrument of congressional policy, in implementing a permit system denominated as the *National* Pollutant Discharge Elimination System. Nothing in the constitutional principles cited by the petitioner suggests an inference that the states may not so act, even to the extent of regulating federal activities and enclaves.

Underlying these constitutional principles, of course, is the fear that a state may impose undue burdens on the performance of federal functions, thus impeding the objectives of federal law. See, *e.g., Johnson v. Maryland,* 254 U.S. 51 (1920). We could respond simply that Congress concluded that the objectives of the water act outweigh the risks of such burdens. Or we could respond that, since the states concededly have authority to impose such burdens by virtue of their authority to impose "substantive" limitations on federal dischargers, little additional burden results from their "procedural" authority to issue permits.[43] However, neither response wholly dispels the fear that some states, in moments of unbridled enthusiasm, might impose conditions on federal dischargers which *unduly* impair the performance of federal functions, or even threaten the national interest.

Congress, aware of this danger, avoided it not by preventing the states from exercising any control over federal dischargers, but rather by building safeguards in the act to limit the extent of such control. Section 313, for example, authorizes the President to exempt effluent sources of federal agencies from state permit programs if such is in the "paramount interest" of the United States. 33 U.S.C. (Supp. III) § 1323. The section also authorizes the President to provide such an exemption if funds are unavailable to meet the act's requirements, but only if such funds were requested by the President but not approved by Congress. *Ibid.* These provisions allay any fear that the states will unduly impair the performance of vital federal functions, and thus serve to protect the same national interests as the constitutional principles cited by the petitioner.

Moreover, additional safeguards are found in the elaborate procedures devised by Congress for the adoption,

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43. The Ninth Circuit, in the case below, characterized the function of such permits as to "certify" compliance with the "limitations" and "standards" of the act. 511 F.2d at 968.

administration and enforcement of state permit programs. First, the act provides that a state NPDES permit program must contain nine elements, none of which—as noted by the petitioner—may be excluded at the option of the state. 33 U.S.C. (Supp. III) §§ 1342(b)(1)-1342(b)(9); Pet. Brief, 25 n. 54. Second, the act provides for extensive federal review of such programs, both before and after their adoption. For instance, such programs cannot become effective unless approved by the Administrator, 33 U.S.C. (Supp. III) § 1342(b), and such approval must be withdrawn if the state fails to properly administer its program, *id.* at § 1342(c). The Administrator can disapprove the issuance of an individual permit by the state, *id.* at § 402(d)(2), and can enforce a state permit if the state fails to do so, *id.* at § 1319. Thus, the states' discretion under the act is sufficiently circumscribed to dispel any fear that the states will unduly impair the performance of federal functions. If such an impairment nonetheless results, Congress retains the ultimate power to revoke the authority of the states, individually or collectively, under the act.

This statutory scheme thus fails to present the constitutional concerns raised in cases where Congress has adopted state law as a form of "surrogate" federal law.[44] For instance, in *United States v. Sharpnack*, 355 U.S. 286 (1958), the Court considered the constitutionality of the Assimilative Crimes Act of 1948, which made the laws of each state —including laws yet to be enacted—applicable on federal enclaves within the state. The Court, in upholding the constitutionality of the act, noted that such state laws become part of the body of the federal law, and stated:

44. There are other examples of such federal laws. See, *e.g.*, Outer Continental Shelf Act, 43 U.S.C. § 1333(a)(2); Federal Tort Claims Act, 28 U.S.C. § 1346(b).

> "This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State." *Id.* at 294.

Here, Congress did not even proceed to the constitutional brink, as it did in the *Sharpnack* case. The water act does not assimilate the varying and random laws of the state into a disjointed body of federal law; rather, it provides specific procedures which the states must follow in achieving a specific national objective, and provides for federal review of state action. Rather than blindly dumping all the states' laws into a federal hopper, the act carves out a narrow pathway for the states to tread in arriving at a particular destination, and employs a federal guide to assure that the states do not lose their way.

In authorizing the states to bear the primary burden in preventing water pollution, and directing federal dischargers to comply with state requirements towards that end, Congress achieved an accommodation between federal and state interests which significantly contributes to the act's objectives. Many states have acquired a keen familiarity, borne out of long experience, with local water quality problems. These problems vary from state to state, and community to community. For instance, the water quality problems of the populous, industrial northeastern states contrast sharply with those of the semi-arid, agrarian western states. Congress obviously did not intend—except as otherwise expressly provided in the act—for the Administrator to develop national standards for federal dischargers, oblivious to state and local water needs and uses. Rather, Congress intended for such dischargers to bear, equally with other dischargers, the burdens imposed b

state and local communities. It would be difficult to achieve the act's objective if some dischargers were exempted from the standards which are applied to others. To the contrary, Congress intended that "Federal facilities shall be a model for the Nation," and "shall be required to meet all requirements as if they were private citizens." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118-119 (1972), 1 *Legis. Hist.* 805-806.

Moreover, many states have acquired abundant resources —in terms of skills, manpower and experience—in the field of water quality control, and Congress obviously intended to marshal and deploy these resources in the fight against water pollution.[45] It is doubtful if the Administrator, with his many environmental concerns and limited staff, could easily duplicate these resources in most states. Finally, Congress may also have believed that the states are less likely to be sensitive to those internal bureaucratic pressures which federal dischargers may exert on the Administrator—himself a member of the federal bureaucracy—and thus are more likely to be sensitive to the public interest itself. For all these reasons, the act produces not only a total national commitment to the problem of water pollution, at all levels of government, but also a practical and workable solution to the problem.

45. For instance, California's NPDES permit program, adopted in 1972, supplements, and is similar to, a stringent and highly effective water quality control act adopted in 1969, the Porter-Cologne Act. Cal. Wat. Code §§ 13020-13361. The latter act also provides for the issuance of "requirements," the equivalent of permits, to individual dischargers. *Ibid.* That act superseded California's first statutory effort at water quality control, the Dickey Act, which was enacted in 1949. 1949 Cal. Stat., ch. 1549. The success of California's water quality programs is perhaps best revealed by the Administrator's comment that California's "actions in the past have shown that water quality can be controlled." Appendix, 18.

III. Although the States' Authority to Issue Permits to Federal Dischargers Under the Water Act May Be Helpful in Analyzing Their Authority to Do So Under the Air Act, Their Authority Under the Air Act Sheds No Light on the Extent of Their Authority Under the Water Act.

Section 313 of the water act is similar to section 118 of the air act, which provides that federal agencies must comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. § 1857f. The petitioner argues that, because of the similarity of these sections, they must be construed similarly. Pet. Brief, 14, 21. He also argues that, because section 118 was enacted prior to section 313, the latter section must be given the same meaning as the former. *Ibid.* He thus concludes that the Court should reach the same conclusion in this case and in *Kentucky ex rel. Hancock v. Ruckelshaus,* 492 F.2d 1172 (6th Cir. 1974), *cert. granted sub. nom. Kentucky ex rel. Hancock v. Train,* No. 74-220.

The difficulty with the petitioner's argument is that it ignores the fundamentally different approaches of the water and air acts to the problem of pollution. This difference results from the fact that the water act was substantially amended in 1972, and the air act was not. Prior to the 1972 amendments, the approaches of the acts were virtually identical. Both acts provided for the development of ambient "standards" for polluters, and for state "plans" to "implement" the "standards." *Compare* 79 Stat. 903, 908 (1965), *with* 42 U.S.C. §§ 1857c-4, 1857c-5.[46] The

46. Although section 118 of the air act requires federal agencies to comply with "requirements," the pre-1972 water act required such agencies to comply with water quality "standards." *Compare* 42 U.S.C. § 1857f, *with* 84 Stat. 91, 107 (1970). This difference evidently derives from the fact that the ambient "standards" of the acts were defined differently. Under the air act,

authority of the states to tailor these "standards" to individual polluters, including federal agencies, by a permit system arose only by implication.

However, the 1972 amendments to the water act removed any ambiguities concerning the states' authority to issue permits under that act. The amendments expressly authorize the states to develop limitations for individual dischargers by an NPDES permit program, and provide no exemption for federal dischargers. In this context, section 313 clearly confirms the obligation of federal dischargers to comply with such permit programs. This clarity is not found in section 118, of course, since the air act contains no equivalent permit system.

We do not necessarily resist the conclusion, however, that sections 313 and 118 should be read similarly. Indeed, there are many similarities in the language, structure and legislative history of the acts which support this conclusion.[47] Perhaps the 1972 amendments to the water act,

"standards" are different from the "plans" by which they are implemented. 42 U.S.C. § 1857c-4, 1857c-5. However, under the pre-1972 water act, "standards" included the "plan" to implement the "water quality criteria" of the act. 79 Stat. 903, 908 (1965). Thus, Congress apparently used the word "requirements" in the air act to insure that federal agencies are subject to such "plans," but was content to use the word "standards"—which already included such "plans"—in the pre-1972 water act.

47. For instance, both acts provide that the "primary" responsibility for preventing pollution rests with the states. *Compare* 33 U.S.C. (Supp. III) § 1251(b), *with* 42 U.S.C. § 1857(a)(3). Both contain a section authorizing the states to develop a more stringent "standard or limitation," and a more stringent "requirement" respecting the "control and abatement" of pollution than those otherwise provided in the acts. *Compare* 33 U.S.C. (Supp. III) § 1370, *with* 42 U.S.C. § 1857d-1. Both allow states to adopt "schedules" for "compliance" with the plans or programs developed by the states under the acts. *Compare* 33 U.S.C. (Supp. III) § 1362(11), *with* 42 U.S.C. § 1857c-5(a)(2)(B).

The legislative history of both acts is also similar. The congressional reports describing the effect of section 313 made reference

which removed the ambiguities which might still remain in the air act, provide a clue to the meaning of the air act, with respect to the issues in this and the *Kentucky* case; perhaps the NPDES permit system fathered by the water act is an approximation of the type of program which Congress expected the states to develop in adopting "implementation plans" under the air act. However, the converse is not true. The air act, which lacks the clarity found in the 1972 amendments to the water act, sheds no light on the meaning of those amendments, with respect to the issues here. Thus, if sections 313 and 118 are to be interpreted harmoniously, section 118 must be interpreted in light of the meaning of section 313, not—as contended by the petitioner—*vice versa*.

Another option is open to the Court, of course. The fundamental dissimilarities of the water and air acts, particularly with respect to the states' authority to adopt NPDES permit programs under the water act,[48] might be

to "effluent limitations," "standards," and so forth. See pp. 38-39, *supra*. The congressional reports describing the effect of section 118 made reference to "applicable standards of air quality and emissions." Conf. Rep. (H.R. Rep. No. 91-1783), 91st Cong., 2d Sess. 48 (1970). None of these reports indicated whether the states may issue permits to federal agencies.

48. The acts contain dissimilarities other than with respect to the states' authority to adopt NPDES permit programs. For instance, section 505(f) of the water act describes an "effluent standard or limitation" as including a "permit" issued under section 402, and the latter as including a "requirement" under section 313. 33 U.S.C. (Supp. III) § 1365(f). Section 313 of the water act provides an example of such "requirements" by using the phrase "including the payment of reasonable service charges." *Id.* at § 1323. No similar provisions are found in the air act.

Additionally, the water act expressly allows the states to enforce their permit programs by injunctions and civil and criminal penalties. *Id.* at § 1342(b)(7). The air act, by way of contrast, does not indicate how the states are to enforce the "implementation plans" adopted under that act. Also, the water act expressly allows

construed as denoting a congressional intent that sections 313 and 118 are to be construed differently. Under this approach, the states would have authority to issue permits to federal agencies under the water act, but not under the air act. Because of these options, the Ninth Circuit, in upholding the states' position in this case, properly observed that its decision is consistent with an affirmance or reversal of the Sixth Circuit's decision in the *Kentucky* case. 511 F.2d at 973.

Therefore, the petitioner, in arguing that sections 313 and 118 must be read harmoniously, ignores the fundamentally different contexts of these sections, and oversimplifies the task which faces the Court. Rather than proceeding on the assumption that the sections must be read *in pari materia,* the Court must examine the similarities and dissimilarities of the acts to determine whether that assumption is correct. Because of the greater clarity found in the water act, section 313 might illuminate the meaning of section 118, but the reverse is not true. Thus, the issues in this case may be helpful in resolving the issues in the *Kentucky* case, but the issues in that case provide no guidance here.

CONCLUSION

The water act reposes in the states the primary responsibility in achieving the national goal of improved water quality, and prevention of water pollution. The Administrator is to act as a general overseer of the states' actions

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the states to bring actions against the Administrator to compel adoption of a state permit program. *Id.* at § 1369(b)(1)(D). The air act, however, does not expressly indicate that the states may bring actions against the Administrator to compel adoption of a state implementation plan, although such authority is arguably found in sections 118 and 304 of that act. 42 U.S.C. §§ 1857f, 1857h-2.

in meeting that responsibility, and—in instances where a state fails to meet it—to assume it directly. He is not, however, to assume responsibility over a class of dischargers—federal dischargers—in instances where a state is meeting its responsibility in the manner intended by Congress.

Indeed, the states cannot adequately meet the responsibility entrusted to them if they lack authority to control water pollution by federal dischargers. Without minimizing the extent to which other dischargers—particularly industrial and municipal dischargers—have contributed to the nation's water quality problem, federal dischargers have also significantly contributed to the problem. As Congress noted:

> "Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort." S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. Accord, H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118 (1972), 1 *Legis. Hist.* 805.

In California, for example, the Navy, which operates a series of bases that ring San Francisco Bay, is among the largest polluters of the bay. To immunize federal dischargers from the states' water quality effort, by immunizing them from the permit programs which form the very heart of that effort, would impede the states in achieving the very goal which Congress—after years of experimentation and months of debate—deemed to be of the highest national importance.

California, in developing a stringent water quality program based on the NPDES system, has properly responded

to the congressional mandate contained in the water act. The petitioner, in seeking to prevent the application of that program to federal dischargers, is seeking to limit the effect of California's program, and to expand his power at California's expense. His effort shows little regard for the clear expression of congressional intent found in the water act, and denies California the control and responsibility over her resources envisioned by Congress. If the Administrator wishes to change the act, his remedy is with Congress, not the courts. We thus urge affirmance of the judgment of the Ninth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO: 74-1435

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents-Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
EX REL STATE WATER RESOURCES CONTROL
BOARD AND STATE OF WASHINGTON, et al.,
Petitioners-Appellees.

On Appeal From The Court of Appeals
Of The United States For The Ninth Circuit

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA AND THE STATE OF WASHINGTON

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CASE AUTHORITY

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297 US 209; 80 LE 586; 56 S Ct 417 (1936) 21

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Markham v Cabell
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Maun v United States
347 F 2d 970 (9th Cir, 1965) 10

Mayo v United States
319 US 441; 87 LE 1504; 63 S Ct 1137 (1943) 10

McCulloch v Maryland
4 Wheat 316 (1819) 9

Pacific Coast Dairy Inc v. Dept of Agric of Calif
318 US 285, 87 LE 761; 63 S Ct 628 (1943) 21

STATUTORY AUTHORITY

Atomic Energy Act of 1954, Section 271,
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— 42 USC 1857c-2 12
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Federal Water Pollution Control Act
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— 33 USC 1251 (b) 14
— 33 USC 1323 .....2, 15
— 33 USC 1342(b) 14
— 33 USC 1342(c) 15

Michigan Water Resources Act, Section 7,
MCLA 323.7; MSA 3.527 15

ADMINISTRATIVE AUTHORITY

Mich Administrative Code
— 1967 AACS R 336.21 13
— 1967 AACS R 336.29 13

MISCELLANEOUS AUTHORITY

Columbia Law Review, Vol 47, 1943 17

Congressional Record, Vol 116, page 32920 (1970) .. 7

Council of Environmental Quality
— *Second Annual Report* (1971) 8
— *Fourth Annual Report* (1973)..... 19

Environment Reporter
— Vol 4, No. 22 15
— Vol 4, No. 27 15

Environmental Protection Agency, Office of Air Programs, *Real Property Owned by the Federal Government in the State of Michigan* (June, 1971) 21

General Services Administration, *Inventory Report – Real Property Leased to the United States Throughout the World*, (June 30, 1973) 21

Holmes, *Collected Legal Papers* 16

More, *Utopia* 16

The Boston Globe, January 1, 1971 11

Zwick and Benstock, *Water Wasteland*, 1971 21

STATEMENT OF THE QUESTION INVOLVED

WHETHER FEDERAL AGENCIES MUST OBTAIN AND COMPLY WITH STATE WATER POLLUTION CONTROL PERMITS AS MANDATED BY THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 SINCE CONGRESS WAIVED FEDERAL IMMUNITY AND SINCE AN EFFECTIVE NATIONWIDE POLLUTION CONTROL PROGRAM REQUIRES AN ALL ENCOMPASSING PERMIT PROGRAM?

The Federal Government, Appellee says "No."

The Court of Appeals says "Yes."

The States of California and Washington, Appellants, say "Yes."

The State of Michigan, Amicus Curiae, says "Yes."

STATUTE INVOLVED

Section 313 of the Federal Water Pollution Control Act, amendments of 1972, 86 Stat. 875, 33 U.S.C. 1323, provides as follows:

"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

INTEREST OF THE AMICUS

The People of the State of Michigan comprise more than 8,875,000 residents as of the 1970 census. The area of the State of Michigan includes more than 96,720 square miles.

The State of Michigan is vitally concerned with matters of environmental quality affecting its air, land, and water and in this regard has enacted comprehensive legislation.

Federal agencies occupy 1,438 site locations throughout the State of Michigan.[1] This represents 3.4% of the annual rental of real property to the federal government in the United States.[2]

A recent survey by the Environmental Protection Agency enumerated 290 locations in Michigan that would be affected by a ruling requiring federal facilities to obtain state and local pollution permits.[3] Included in this listing are 9 major installations of more than 1,000,000 square feet.[4]

Michigan believes that federal installations within its borders are and can become significant sources of pollution which must be controlled. Consequently, Michigan views the outcome of this litigation with profound concern. We are convinced a ruling of this Court which exempts federal facilities from state and local pollution permits would have a deleterious effect on the residents and the natural resources of the State of Michigan.

The People of the State of Michigan, therefore, respectfully file this brief as an amicus curiae pursuant to Rule 42 of the Rules of this Court.

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PEOPLE OF THE STATE OF CALIFORNIA, EX REL STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, et al.,
Petitioners-Appellees.

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA AND THE STATE OF WASHINGTON.

STATEMENT OF THE CASE

The Federal Water Pollution Control Act Amendments of 1972 established a program for reducing and eliminating pollutants discharged into the waters of the United States. The heart of the water quality control program was the issuance of permits, called the National Pollutant Discharge Elimination System ("NPDES"). States may obtain authority for issuing NPDES permits program after obtaining the approval of the Administrator of the Environmental Protection Agency.

The State of California submitted its proposed permit program on February 15, 1973 to the Administrator of the

Environmental Protection Agency. The Administrator approved the California plan, but exempted discharges of federal facilities on May 14, 1973.

Similarly, the State of Washington submitted its program proposal on September 14, 1973. The Washington permit program was approved by the Administrator on November 14, 1973 also with an exemption for federal facilities.

Both California and Washington filed a petition for review of the Administrator's disapproval of the States' permit program as applied to federal facilities. (October 23, 1973 and October 24, 1974 respectively.)

In an opinion issued on February 13, 1975, the United States Court of Appeals for the Ninth Circuit held that federal discharges within a state's jurisdiction must comply with state permit programs. [511 F. 2d 963 (9th Cir, 1975).] This Court subsequently granted a writ of certiorari.

It should be noted, furthermore, that this case is interrelated with the decision of the Sixth Circuit in *Kentucky v Ruckelhaus*, 497 F 2d 1172 (6th Cir, 1974), cert granted *sub nom Kentucky v Train*, No 74-220, (March 17, 1975) which involves the question of federal compliance with state and local air pollution permit requirements.

SUMMARY OF THE ARGUMENT

The federal government is a major polluter. The myriad of actual and potential pollution problems from federal facilities compels an effective response.

Reacting to the problem of federal facilities' pollution, Congress expressly waived the historic immunity granted to federal agencies from state regulation. Specifically, Congress mandated that federal facilities comply with state and local pollution control permits as if they were private persons.

This integration of federal facilities into state and local permit system recognizes the importance of a permit system to identify pollution and to adapt an effective control technology to the problem.

ARGUMENT

I.

THE FEDERAL GOVERNMENT IS A MAJOR POLLUTER.

> *". . . Federal agencies have been notoriously laggard in abating pollution . . . We cannot expect individuals and businesses to abate pollution if their government continues to pollute . . ."*
>
> — United States Senator William B. Spong, Jr. of Virginia, 116 Cong Rec 32920 (1970).

In the area of water pollution, the federal government has produced a host of pollution nightmares. Federal agencies have brought the nation "red water" (caused by an unusuable isomer of TNT), photographic processing wastes, chemical and biological warfare pollutants, aircraft washing wastes, heavy silting from road construction, pesticide and herbicide concentrations, salinity from unwarranted irrigation projects and deoxygenated water from federal dams.[5] In 1968, the Department of the Defense discharged more than 335 million gallons of human wastes per day, of which 25-30% was given less than secondary treatment.[6] Each year, the government dredges up and relocates 7 million cubic yards of polluted spoil from the Great Lakes.[7]

Cataloging federal air pollution is somewhat more elusive to detail; yet nonetheless, it is a significant problem. The lack of integration of federal air pollution sources into permit programs, undoubtedly, accounts for the inability to enumerate precisely the problem. Some information is available, however.

In its Petition for A Writ of Certiorari to this Court, the federal government noted that there are more than 1,800 major and medium installations in the Ninth Circuit alone which might be affected by a decision requiring federal installations to seek state pollution permits. (Page 8 of the Petition.) Nationwide, the problem is potentially staggering. As of 1973, there were a total of 49,008 federal installation locations.[8] While not all of these sites are sources of pollution, in particular air pollution, a significant number certainly would qualify.

Federal pollution is not illusory. Note the conclusion one study found in relation to the federal government:

> "In the face of our environmental crisis, an aroused public's natural inclination is to turn to the Federal government for help. Yet the alarming truth is that the Federal government is one of the worst polluters in the U.S. Like a huge, grimy hand, its environmental exploitation stretches from Alaska, where giant Air Force bases before their still relatively pristine surroundings, to West Point, New York, where the U.S. Military Academy dumps more than a million gallons a day of poorly treated effluent into the Hudson River."[9]

In advising the President on the state of national environment, the Council on Environmental Quality has similarly stated,

> "While progress is being made in cleaning up federal facilities, some individual facilities are still major polluters. Many of these are on military installations. As in the case of industrial pollution, management attitude is the critical ingredient in complying with environmental standards." [*2d Annual Report* of the Council of Environmental Quality (Aug. 1971)]

There can be no doubt as to the seriousness of the pollution problem at federal installations. Continued pollution at these facilities undermines the credibility of governmental efforts to abate pollution in the private sector. We submit that a major step towards restoring the government's credibility and in protecting our nation's natural resources would be to integrate federal installations into state and local pollution permit systems. Consequently, we now turn our attention to this question.

II.

DESPITE THE SUPREMACY DOCTRINE, CONGRESS MAY EXPRESSLY AUTHORIZE FEDERAL AGENCY COMPLIANCE WITH STATE AND LOCAL LAWS.

> *"The King hath no prerogative but that which the law of the land allows him."*
>
> — Coke, *Case of Proclamations* 12 Rep 74, 76 (1611).

This Court has long interpreted the Supremacy Clause of Article VI of the United States Constitution as authority for the principle that the federal government is immune from state and local regulation and taxation. In the historic case of *McCulloch v Maryland*, 4 Wheat 316 (1819), Chief Justice Marshall wrote:

> ". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." [4 Wheat 316, 435 (1819)]

The language of *McCulloch* certainly establishes federal government immunity from a broad range of local and state licensing and inspection laws. Yet, the immunity granted to federal agencies is not absolute.

Congress may affirmatively subject federal governmental instrumentalities and property to state and local regulation. As stated by this Court in *Mayo v United States*, 319 US 441, 446 (1943), "it lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."[10] The doctrine of immunity as derived from the Supremacy Clause may be limited and waived by Congressional action.

A relevant example of a Congressional waiver of federal sovereign immunity is the case of *Maun v United States*, 347 F 2d 970 (9th Cir. 1965). In *Maun*, the Court of Appeals held that section 271 of the Atomic Energy Act of 1954, 42 USC 2018, required the Atomic Energy Commission to accede to any federal, state, or local regulation with respect to the generation, sale, or transmission of electric power.

Since Congress may expressly authorize federal agency compliance with state and local regulations, it is crucial to examine what duties are affirmatively imposed by Congress on federal facilities and agencies in the area of state and local regulation of pollution. This fundamental interpretive question is the focus of our attention now.

III.

UNDER THE CLEAN AIR ACT OF 1970 AND THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, CONGRESS HAS WAIVED THE IMMUNITY OF FEDERAL FACILITIES AND PLACED THEM ON A PAR WITH PRIVATE POLLUTERS IN TERMS OF COMPLIANCE WITH ALL STATE AND LOCAL POLLUTION CONTROL REQUIREMENTS INCLUDING PERMIT PROCEDURES.

The central issue of this litigation is whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act Amendments of 1972. [33 USC 1251, et seq.] The question of whether federal agencies must comply with the Clean Air Act of 1970, 42 USC 1857, et seq, and obtain state permits is so interrelated that we will address both questions. We hope to note relevant distinctions, however, between the air and water control programs.

A. SECTION 118 OF THE CLEAN AIR ACT OF 1970 MANDATES THAT FEDERAL AGENCIES COMPLY WITH ALL STATE AND LOCAL REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF AIR POLLUTION.

"(The Clean Air Act of 1970 represents) the toughest, most far-reaching environmental legislation ever enacted by Congress."

— Senator Edmund S. Muskie, as quoted in *The Boston Globe*, January 1, 1971, on page 2.

To understand the integration of federal facilities in the effort to abate pollution nationwide, a brief understanding of the Clean Air Act of 1970, 42 USC 1857 et seq, is necessary.

The Clean Air Act of 1970 places primary responsibility for air quality control at the state government level. 42 USC 1857c-2. States have the delegated duty to maintain national ambient air standards for various pollutants within their respective borders. 42 USC 1857c-5. Furthermore, each state has authority to establish more stringent air quality standards than the national standards. 42 USC 1857d-1. Air pollution abatement is thrust, therefore, directly to the states under federal law.

There is, also, substantial coordination between state air quality control efforts and the federal government. Each state, for instance, must prepare and submit to the Federal Environmental Protection Agency for approval an implementation plan which details the maintenance and enforcement of ambient air standards. 42 USC 1857c-5.

In early 1972, pursuant to the requirements of the Clean Air Act, 42 USC 1857c-5, the State of Michigan submitted a plan describing its implementation of Federal primary and secondary ambient air quality standards. The Administrator of the United States Environmental Protection Agency, reviewed this plan, known as the "Michigan Implementation Plan," and in May of 1972 timely approved it (with an exception not here relevant). The Michigan Implementation Plan adopted a control strategy to require that all uncontrolled sources of air pollution would be brought into compliance by legally enforceable compliance schedules. Once approved by the Administrator, Environmental Protection Agency, the Michigan Implementation Plan became a federal-state implementation.

Another key element for the integration of the federal government into the states' programs for air pollution abatement is Section 118 of the Clean Air Act. Section 118 provides in relevant part that:

> "Each department, agency and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local *requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.*" [42 USC 1857f (emphasis ours)]

Thus, the program of air pollution control includes federal approval of a state program and also federal compliance with the terms of the state program; federal-state relations on air pollution control is a two-way process.

Under Michigan law, a person cannot "install, construct, reconstruct or alter any process, fuel burning, or refuse burning equipment which may be a source of an air contaminant, or control equipment pertaining thereto, before issuance of a permit by the [Michigan Air Pollution Control] Commission." Michigan Administrative Code, 1967 AACS R 336.21. Additionally, a person cannot "operate a process, fuel burning, or refuse burning equipment which may be a source of an air contaminant, nor an air cleaning device pertaining thereto, before the issuance of a permit to operate by the [Michigan Air Pollution Control] Commission." Michigan Administrative Code, 1973 AACS R 336.29. In summary, under Michigan law a person seeking to utilize a potential source of air pollution must secure two permits: a permit to install and a permit to operate.

Juxtaposing Section 118 of the Clean Air Act, 42 USC 1857f, with the requirements for abatement of pollution that any person in Michigan is subject to would clearly mandate

that any federal instrumentality operating in Michigan, which is a source of air pollution, secure an installation permit and an operating permit from the Michigan Air Pollution Control Commission.

B. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 ALSO DICTATES THAT FEDERAL AGENCIES COMPLY WITH ALL STATE AND LOCAL REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF WATER POLLUTION.

"No one has the right to use America's rivers and America's waterways, that belong to all the people, as a sewer. The banks of a river may belong to one man or one industry or one State, but the waters which flow between the banks should belong to all the people."

— President Lyndon Johnson, upon signing the Water Quality Act of 1965.

The Federal Water Pollution Control Act Amendments of 1972, like the Clean Air Act, but with even more force, integrates federal facilities into the state and local programs to control water pollution. This becomes clear upon examination of the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251 et seq.

Like the Federal Clean Air Act of 1970, the Federal Water Pollution Control Act of 1970 recognizes the primary responsibility for water pollution abatement at the state level. 33 USC 1251(b). The water act explicitly authorizes the states to develop and enforce a permit system to achieve compliance with the standards established in the act. 33 USC 1342(b). Furthermore, when the Administrator of the Environmental Protection Agency approves a state permit

program, the issuance of federal permits is suspended. 33 USC 1342(c). The state permit, after approval of the program, becomes a national permit.

Section 313 of the Federal Water Pollution Control Act Amendments of 1972 specifically integrates federal agencies and instrumentalities into the state permit programs; Section 313 stipulates that federal agencies and instrumentalities:

> ". . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements including the payment of reasonable service charges." [33 USC 1323]

This section requires that federal facilities comply with all water pollution control requirements as if they were private citizens.

Pursuant to Section 7 of Michigan's Water Resources Act, a person cannot "discharge any waste or waste effluent into the waters of [the] state unless he is in possession of a valid permit therefor from the [Michigan Water Resources] Commission." 1929 PA 245, as amended last by 1973 PA 3, being MCLA 323.7; MSA 3.527. The Michigan permit program is approved under the federal waste water discharge system, also. Regulations for participation in the National Pollutant Discharge Elimination System were approved by the Michigan Water Resources Commission on September 21, 1973. 4 *Environment Reporter* 880 (No 22, September 28, 1973). On October 18, 1973, Michigan became the fourth state to be granted permanent authority by the Environmental Protection Agency to issue National Pollutant Discharge Elimination Permits. 4 *Environment Reporter* 1115 (No 27, November 2, 1973).

A private person discharging waste into the waters of Michigan, therefore, must secure a permit from Michigan authorities pursuant to both state and federal law; federal agencies discharging waste into Michigan waters under Section 313 of the Water Pollution Act Amendments of 1972 should also secure a permit from Michigan authorities.

C. THE CRITICAL STATUTORY PHRASE, "COMPLY WITH REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF POLLUTION TO THE SAME EXTENT ANY PERSON IS SUBJECT TO SUCH REQUIREMENTS," SHOULD BE INTERPRETED TO INCLUDE COMPLIANCE WITH STATE AND LOCAL PERMIT PROCEDURES BY FEDERAL AGENCIES.

"All laws are promulgated for this end, that every man know his duty; and, therefore, the plainest and most obvious sense of the words is that which must be put upon them."

— Sir Thomas More, Utopia, bk 2.

The plain language of the Water Pollution Control Act Amendments of 1972 and the Clean Air Act of 1970 should govern this litigation. Two extremely eminent members of this Court have commented upon the controlling nature of the language of a statute as follows:

> "We do not inquire what the legislature meant; we only ask what the statute means."
>
> [Mr. Justice Oliver Wendell Holmes, Collected Legal Papers, 207.]

and

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute."
>
> [Mr. Justice Felix Frankfurter, quoted in 47 Col L Rev 527, 543 (1947).]

The federal government suggests the water act includes something more than the statutory language, however. Specifically, the federal government contends that there are two types of "requirements," procedural and substantive. The federal government further asserts that federal agencies and installations must only comply with substantive requirements and not with procedural requirements which include permit procedures. This position does not comport with the language of Section 118 of the Clean Air Act of 1970 or with Section 313 of the Water Pollution Control Act Amendments of 1972.

Both Section 118 of the Clean Air Act of 1970 and Section 313 of the Water Pollution Control Amendments of 1972 contain essentially the same telling phrase; both acts dictate that federal agencies apparently must comply with "requirements respecting control and abatement of air [water] pollution to the same extent that any person is subject to such requirements." Congress did not state that federal compliance was limited to emission standards or compliance schedules. There is nothing in the statutory language, furthermore, which suggests a distinction between substantive and procedural requirements.

The words "requirements respecting control and abatement of pollution" is all encompassing. A "requirement" is easily defined as being that which is required. Indeed, reading the phrase "to the same extent as any other person"

with the phrase "comply with requirements respecting control and abatement of pollution" compels the conclusion that Congress placed federal facilities on the same basis as private persons.

We submit, therefore, that Congress waived the immunity of federal facilities and directed them to comply with state and local pollution control requirements including permit procedures.

IV.

FEDERAL AGENCIES SHOULD NOT BE ALLOWED TO CIRCUMVENT THE PERMIT PROCESS WHICH IS THE FOUNDATION FOR AN EFFECTIVE STATE AND LOCAL POLLUTION CONTROL PROGRAM.

"The policy as well as the letter of the law is a guide to decision."

— Justice Douglas, in *Markham v Cabell*, 326 US 404, 409 (1945).

The mandate from Congress to the states is to provide the citizens of our country with clean air and water. Specifically, the instruction from Congress is to regulate all sources of pollution. Significantly, Congress waived the immunity of federal facilities and integrated federal agencies into state and local pollution control. The state and local permit is the vehicle which carries out this direction from Congress.

At the practical level, pollution abatement is often secured by the imposition of a compliance schedule for the installation of a control technology. The technology is subsequently evaluated by a monitoring program. Underlying this entire process is a state and local permit.

A permit program provides a vital information function. Permit applications, for instance, provide basic data as to what pollutants a facility will discharge or emit and where and when such emissions will occur. This is the raw information which determines the need for a compliance and monitoring program at a polluting source.

The National Council on Environmental Quality in its 1973 report, in reference to the permit system required under the Federal Water Pollution Control Act, stated:

> "Once the permit system is fully operational, it should provide a comprehensive picture of the pollution coming from point sources as well as a vital tool for reducing such pollution." [Council on Environmental Quality, *Fourth Annual Report*, 280 (1973).]

Naturally, involvement in a state or local permit program will result in some minimal inconvenience to federal agencies. The alternative, however, is entirely unacceptable. Without federal compliance to state and local permit programs, there exists no means to determine whether a federal agency has achieved technical compliance with substantive standards. Locating potential federal sources of pollution is, also, a serious problem without an inventory process that a permit program provides. The permit process insures that federal agencies comply with the laws and regulations for pollution control. If any one or more sources remains independent of a state or local control program, it may become impossible to maintain air and water quality standards. In our view, the federal government has no special license to pollute and should therefore, comply with state and local permit requirements.

CONCLUSION

The State of Michigan believes that federal facilities should be subject to state and local permit requirements because:

1) Congress waived immunity from state regulation for federal facilities, and

2) an effective nationwide pollution abatement program requires the integration of federal facilities into the state pollution control system.

Consequently, Michigan urges this Court to affirm the decision below.

Respectfully submitted,

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FOOTNOTES

[1]
General Services Administration, *Inventory Report – Real Property Leased to the United States Throughout the World.* (June 30, 1973), p 36.

[2]
Id., pp. 16-17.

[3]
Environmental Protection Agency, Office of Air Programs, *Real Property Owned by the Federal Government in the State of Michigan* (June, 1971).

[4]
Id. The nine installations are as follows: Veterans Administration Hospital (Battle Creek), Wurtsmith Air Force Base, Selfridge Air Force Base, Detroit Arsenal and Tank Plant, Fort Custer, Keweenaw Fld. Stat., Michigan Army MSL P1, Kincheloe Air Force Base and K.I. Sawyer Air Force Base.

[5]
Zwick, David and Benstock, Mary, *Water Wasteland*, Bantam Books, Inc., (New York, 1971), p. 340.

[6]
Id.

[7]
Id.

[8]
General Services Administration, *supra* fn 1, p. iv.

[9]
Zwick, *supra* fn 5, p. 340.

[10]
See also, *Baltimore Nat Bank v State Tax Commission*, 297 US 209, 211 (1936); *Pacific Coast Dairy Inc v Dept of Agric of Calif*, 318 US 285, 296 (1943).

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THE ENVIRONMENTAL PROTECTION AGENCY, AND RUSSELL E. TRAIN, AS ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD,
Respondent.

BRIEF OF STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTRODUCTION

The issue presented for determination is whether Title 33, Section 1323 of the United States Code requires federal agencies, institutions, or enclaves to apply for and receive a discharge permit issued by a state pursuant to Title 33, Section 1342 of the Code.

The larger issue involved in this review is whether the states may assume without exception their responsibility to regulate discharges into their respective streams. In order to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution . . .", 33 U.S.C. Section 1251(b) (1973 Supp.), there must be some assurance that the methodology and enforcement tools to achieve those lofty goals are uniform within all areas of the respective states.

Amicus curiae respectfully submit that the Ninth Circuit Court of Appeals correctly decided this case by holding that Section 1323 required compliance with the procedures and substantive requirements of State issued discharge permits under the federal law.

STATEMENT OF INTEREST OF AMICUS

On September 5, 1974, the State of Maryland assumed its inherent responsibility to administer the National Pollutant Discharge Elimination System permit program, authorized pursuant to Title 33, Section 1342(b) of the Code. Similar to the practice followed in the states of California and Washington, Environmental Protection Agency officials represented that federal installations would not be subject to the state permit procedures. This means that the proposed discharges would not be reviewed through the mandated public hearing requirement under state law, nor would there be a full review by all affected state agencies.

According to the Memorandum of Understanding between the Environmental Protection Agency and Maryland, which evidenced "approval" of the state program, federal applications for a discharge permit are not forwarded to the state for processing. Prior to publication for public notice, Maryland receives a copy of the application together with a summary report prepared

by the Environmental Protection Agency. The parameters for the discharges together with the monitoring requirements are included in this summary report.

There are are approximately 1,200 dischargers of pollutants into Maryland's waters, 48 of which are federal installations discharging approximately from 101 point sources into Maryland waters. Federal installations discharge into water quality limited areas, tributary to the Chesapeake Bay as well as to Patuxent, Potomac and Patapsco Rivers.

Because Maryland has no control over the procedures utilized to issue discharge permits for federal installations, the priority in which the permits are issued and the relationship of discharges from federal installations to the assimilative capacities of the streams are subject to federal determinations only.

SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act, as amended in 1972, was enacted to restore the integrity of the Nation's waters. The methodology to achieve that end relies principally on the traditional police powers of the states and, in fact, Congress recognized the primary responsibility and rights of the states to prevent, reduce and eliminate sources of pollution. In furtherance of that goal, the various States are charged to determine what streams within their boundaries will require the imposition of more stringent requirements than what is considered to be the best practicable control technological standard. The various assimilative capacities of these streams are computed and the loading authorizations are part and parcel of the discharge permit limitations. The permit encompasses the discharge limitations and itself is a limitation subject to review, monitoring, and the enforcement procedures set out in the federal act. The permit is the

end product of the various planning processes mandated under the federal act. The administration of the program and strategy pursued by the various states must relate the processing, issuance, and compliance schedules of all dischargers to achieve reduction of pollution in order to restore the Nation's waters.

The language of Section 1323 (Section 313) of the Federal Water Pollution Control Act Amendments of 1972 is unequivocal in its requirement that discharges and runoffs of pollutants must comply with the state and local requirements. The attempted distinction between substantive and procedural requirements should not be pursued in this case because of the interrelationship of both. In order to lawfully administer the federal applications, the state may not act in such a manner as to interfere with a federal prerogative and indeed federal review of a state-approved discharge permit program can adequately safeguard the federal interests.

ARGUMENT

I.

THE NINTH CIRCUIT CORRECTLY INTERPRETED THE PLAIN MEANING OF THE FEDERAL WATER POLLUTION CONTROL ACT IN DETERMINING THAT FEDERAL FACILITIES MUST COMPLY WITH FEDERALLY APPROVED STATE DISCHARGE PERMIT PROGRAMS.

(a) *The 1972 Amendments should be construed broadly to effectuate the remedial purposes of the Act.*

Title 33, Section 1323 provides, *inter alia:*

> Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State,

> interstate, and local *requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements,* including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . (emphasis added)

Petitioners argue that the term requirements relate only to those substantive requirements such as, effluent limitations or other water quality parameters which would ordinarily be included with the permit. This *Amicus* submits that there essentially is no difference between a substantive or procedural requirement of a discharge permit. If such a distinction existed, the "substantive" requirements would be almost illusory. The inseparability of discharge limitations and permit programs was recognized by Congress in 33 U.S.C., Section 1342(K), which provides that:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 and 1365, with sections 1311, 1312, 1316, 1317, and 1342 . . .

Section 1365 authorizes suit against the United States for violations of effluent limitations. Subsection (f) thereof entwines the substantive with the procedural by providing that "for purposes of this section, the term 'effluent standard or limitation under this chapter' means * * * a permit or condition thereof issued under section 1342 of this Title which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this Title)". *See also, Committee for Consideration of Jones Falls Sewerage System v. Train,* 375 F. Supp. 1148 (D. Md. 1974).

Considering the remedial purpose of the Act and the congressional acknowledgment of responsibilities for water pollution control, the language of Section 1323 unequivocably supports the conclusion that federal facilities must com ly with state permit procedures. In a case involving sim ar language under the Clean Air Amendments of 1970, i.e., 42 U.S.C. Section 1857f, the Court of Appeals of the Fifth Circuit rejected the argument that "requirements" refers only to substantive air quality standards:

> They (defendants) argue that the phrase 'requirements respecting the control and abatement of air pollution means only requirements such as emission standards, and limitations, which they label 'substantive' and does not include mechanisms, e.g., permit systems for enforcing these requirements. Having affixed these new labels, defendants would have us infer that while federal agencies must, and will, comply with the 'substantive', it was not intended that they be bound by the 'procedural', a term which in defendants' construct is sub-silentio pejorative, impliedly denigrating the Congressionally-mandated mechanisms of enforcement to a status of less dignity and import. This recharacterization of the statutory scheme is a semantical red herring. *Alabama v. Seeber,* 502 F.2d 1238, 1245 (5th Cir. 1974).

The state discharge permit process is an essential part of all substantive provisions. The Maryland discharge permit program, approved by the Administrator of the United States Environmental Protection Agency, 39 Fed. Reg. 34601 (1974), illustrates the interdependence of the socalled substantive and procedural provisions. The permit procedure in Maryland, 1 Md. Reg. 08.05.04.08 and .12, provides the only means by which water quality standards and effluent limitations may be employed. The State can only determine applicable standards and

limitations for a particular facility during the administrative process that begins after a permit application is filed. 1 Md. Reg. .08.05.04.08G (1974). The application forms also provide the public with its major source of information. 1 Md. Reg. .08.05.04.08F (1974). Hearings are not discretionary, but are required in every case. 1 Md. Reg. .08.05.04.08G (1974).

The permits specify the allowable amount of discharge. 1 Md. Reg. .08.04.04.08H (1974). In cases where discharges exceed allowabl limits, the permit provides a schedule of compliance. 1 Md. Reg. .08.05.04.08H(3) (1974).

(b) *Other provisions of the Act which specifically exempt federal facilities indicate that federal facilities are not exempted from state discharge permit procedures.*

Specific exemptions for federal facilities appear through the Act. For example, Section 1316 authorizes the Administrator to regulate standards of performance for new point sources. These standards may require the use of the best available technology and may further prohibit discharge of any pollutant. Under 33 U.S.C. Section 1316(c) (1973 Supp.), the states may adopt similar standards and means of enforcement against all new sources except for those owned and operated by the federal government. The legislative history of the Act fails to explain the reason for the exemption.

Section 1318 provides a similar federal-state exemption procedure for monitoring and inspecting point sources. Likewise, Section 1341 provides that an applicant for a federal permit receive state certification. Section 1341(a)(6) expressly exempts federal facilities from the state certification procedures.

The fact that Congress exempted federal facilities from state operations in these three separate sections indicates that the absence of an exemption in either Section 1323 or

Section 1342 was intentional. If Congress had intended federal facilities to be exempt from state permit requirements, it would have expressly exempted them. Instead, Congress provided only for the limited exemptions authorized by the President. 33 U.S.C. Section 1323 (1973 Supp.).

It is apparent that any justification for exempting federal facilities from state permit requirements cannot be inferred from the statute. It is also apparent that the only justification for the Administrator's blanket exemption of federal facilities would lie in the concept of federalism.

II.

THE ISSUANCE OF STATE DISCHARGE PERMITS TO FEDERAL FACILITIES WILL NOT UNDULY INTERFERE WITH THE POWERS OF THE FEDERAL GOVERNMENT.

Although Congress appears to acknowledge the primary responsibilities of the states to control and prevent pollution of the streams of this country, in authorizing the various states to develop permit program procedures the Administrator of the Environmental Protection Agency is given ultimate control to approve or disapprove a program. 33 U.S.C., Section 1251(b), 1342(b)(1973 Supp.) In formulating its procedures, each state must comply with the guidelines established by the Administrator pursuant to Section 1314(h). 33 U.S.C., Section 1342(c)(2) (1973 Supp.). In adopting procedures for a permit program under the act, specifically the states must additionally comply with requirements established by regulation of the Administrator which include pro forma provisions in the permits, review of permits, enforcement, and agreements for exchange of information. 40 C.F.R. Section 124. After the state program has been approved, the state must transmit each permit application received to the Administrator. Under certain conditions, the Administrator may veto the issuance of any state permit. 33 U.S.C., Section

1342(d)(2) (1973 Supp.). The Administrator may also withdraw "approval" under certain circumstances. 33 U.S.C., Section 1342(c)(3) (1973 Supp.).

The Federal Government, therefore, maintains adequate control of state programs to insure that the national or federal interest is safeguarded. The various controls and submissions required by state programs affect only the incidental operations of a federal institution. The fact that the requirements are not inherently inconsistent with federal interests is evidenced by the statutory ability to exempt federal agencies from these requirements when a conflict can occur.

CONCLUSION

The Federal Water Pollution Control Act recognizes the priority of state programs for water pollution control. The language of Section 1323 echos the requirement that all dischargers, including federal installations, adhere to state requirements.

The specific exemptions within the Act which relieve federal agencies from state enforcement and certification procedures, support the premise that if Congress sought to exempt federal agencies from state permitting requirements, Section 1323 would be totally superfluous. Of course, that is not the case for every other sentence within this section is to achieve some meaning, consistent with the purpose of the Act. It should leave no doubt that federal installations, agencies and enclaves are subject to the same permitting requirements as every other discharger.

Respectfully submitted,

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* * *

NO. 74-1435

* * *

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

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V.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.,

Respondents

* * *

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

* * *

BRIEF OF AMICI CURIAE

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1435

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

V.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE

INTERESTS OF THE AMICI CURIAE

It is the interest of Amici Curiae, States of

Texas and Wisconsin, to seek a determination that federally owned or operated facilities are required by Section 313 of the Federal Water Pollution Control Act Amendments of 1972[1] to obtain, and to comply with the terms of state issued waste discharge permits.

Amicus, State of Wisconsin, has an EPA-approved state permit program. Under its Pollution Discharge Elimination Act of 1973[2], Wisconsin requires that any person discharging pollutants into the waters of the state obtain a discharge permit from the Wisconsin Department of Natural Resources. It is thus in precisely the same situation as California and Washington respecting its authority to issue permits to federal installations in the state.

Amicus, State of Texas, operates a permit system under the Texas Water Quality Act.[3] The State of Texas has not, as yet, been granted authority to administer the federal NPDES permit program. Texas has operated its own state permit program since 1967, well before passage of the 1972 Amendments to the Federal Water Pollution Control Act.

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[1] 86 Stat. 816, et. seq., 33 U.S.C. Sec. 1251, et. seq. (Supp. III, 1975).

[2] WISC. STAT. Sec. 147.01, et. seq. (1973).

[3] TEX. WATER CODE Sec. 21.001, et. seq. (1972).

The Texas Water Quality Act, similarly, prohibits the discharge of any wastes into the waters of the state except pursuant to a permit issued by the Texas Water Quality Board.

In granting permits to discharge pollutants, the states hold public hearings to receive comments from both the public and the discharger. Based upon such hearings, together with information submitted by the discharger concerning the type of wastes to be discharged and the existing and/or proposed treatment facilities, the administrative agency issues a permit that is tailored to the individual discharger. This permit requires the best practicable treatment of wastes, in light of existing technology, economic conditions, and the effect on the body of receiving water. Regulation of effluent quality and quantity by means of the permit system is the primary means of achieving high water quality for both states.

While neither state, at this time, is experiencing critical water pollution problems due to federal installations, the prospect of relying upon voluntary cooperation from such installations to protect the states' water quality and to obtain effluents that are the product of the application of the best available technology is a matter of serious concern.

ARGUMENT AND AUTHORITIES

A state permit program is clearly a "requirement respecting control and abatement of pollution" with which the Federal Government must comply under Section 313.

The Amici believe that the issue sub judice was correctly decided by the Ninth Circuit below, California v. EPA, 511 F.2d 963 (1975), and urge the Court to adopt the result reached in that case. While there is little room to improve upon the court of appeals' well-reasoned analysis of the provisions of the Federal Water Pollution Control Act, Texas and Wisconsin offer the following brief argument.

To discover whether Congress intended that federal instrumentalities should comply with state permit requirements, the plain and unambiguous language of the Federal Water Pollution Control Act must be considered. Caminetti v. United States, 242 U.S. 470 (1917). Section 313 of the Federal Water Pollution Control Act[4] plainly directs federal facilities to "comply with Federal, State. . .requirements respecting control and abatement of pollution to the same extent than any person is subject to such requirements. . . ." The permit programs of California and Washington are quite clearly within this statutory language.

The state permit programs are obviously "requirements" in the ordinary sense of the word. Webster's Third International Dictionary (1969) defines "requirement" as something "needed," "called for," or "demanded"; a "requisite or essential condition." The permit programs of California and Washington, like those of Texas and Wisconsin, are not only "demanded" in the legal sense by state statutes and regulations, they are "essential" to the states' efforts to achieve and maintain high water

[4] 33 U.S.C. Sec. 1323 (Supp. III, 1975).

quality. Petitioners' would have this Court depart from the ordinary meaning of "requirement" and define it to include only "effluent limitations," the phrase used in the Conference Committee Report on the 1972 Amendments to the Federal Water Pollution Control Act.[5] Such a departure is clearly unwarranted.

Had Congress intended that the Federal Government comply only with state effluent limitations or water quality standards, it would have said so. Congress, in fact, enacted the present language to replace a provision contained in 1970 Amendments that provided the precise limitation Petitioners now seek to impose, i.e., "Each federal agency. . . shall. . . insure compliance with applicable water quality standards. . . ."[6] Had Congress intended only compliance with "applicable water quality standards," it would not have modified that language. Similarly, had Congress intended to say only "effluent limitation" or "standard," it would have used those terms in their precise sense as it did in several other sections of the Act.[7] These two

[5] 1972 U.S. Code Cong. & Admin. News at 3812-13.

[6] Act of April 3, 1970, Pub. L. 91-224, Sec. 21(a), 84 Stat. 91,107.

[7] See, Sec. 301, 302, 303, 306, 307, 315, and 510, of the Federal Water Pollution Control Act Amendments of 1972 /33 U.S.C. Sec. 1311, 1312, 1313, 1316, 1317, 1325, and 1370/.

facts--rejection of language in the previous statute that required only federal compliance with state standards, and the failure to use the terms "effluent standards" or "effluent limitations," frequently employed elsewhere in the Act--evince an unequivocal Congressional intent to subject federal facilities to the same regulatory measures applicable to every other source of water pollution.

Moreover, legislative history of the Act shows a clear Congressional displeasure with water pollution abatement efforts of federal installations. As summarized by the report of the Senate Committee on Public Works:

> Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.[8]

---

[8] 72 U.S. Code Cong. & Admin. News at 3733-34 (comments on Sec. 313 of the 1972 Amendments to the Federal Water Pollution Control Act).

Congress, in short, meant what it said -- the federal government shall be subject to the same water pollution requirements as everyone else, except where the President concludes that it is in the paramount national interest to exempt a federal facility from some specific requirement.

Petitioners attempt to impose a substantive-procedural distinction upon the requirements for federal facilities imposed by Congress. As previously discussed, such a distinction is supported by neither the legislative history nor specific provisions of the Act. Moreover, as noted by the court below, this distinction is, as a practical matter, unworkable. In the process of issuing permits, public hearings are held and information is gathered so that the discharge permit ultimately issued is tailored to the individual discharger's effluent, his waste water treatment system, and the body of receiving water. Without involvement in the administrative process that precedes permit issuance, the setting of precise, individually tailored effluent limitations is severely hampered. Nowhere is this effect more pronounced than in the issuance of compliance schedules. Petitioners admit that, even utilizing the substantive-procedural distinction,[9] the state may establish compliance schedules for federal facilities. An administrative process-- involving investigation of necessary waste treatment improvements, submission and review of engineering plans for those improvements, consideration of equipment and raw material availability, and establishment of specific deadlines for completion of

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[9] Petitioners' Brief at 17 & 20.

various phases of construction; together with promulgation of interim effluent limitations--is absolutely indispensable to the issuance of a compliance schedule. That situation, especially, points up the impracticality of petitioners' substantive-procedural distinction. Your Amici completely concur with the Fifth Circuit's conclusion that the attempted distinction is nothing more than a "semantical red herring."[10]

CONCLUSION

The States of Texas and Wisconsin urge this Court to uphold the decision of the Ninth Circuit Court of Civil Appeals. At stake is more than a mere "procedural" requirement. Without permits, and the accompanying administrative process, states will be essentially relegated to the status existing prior to enactment of the 1972 Amendments to the Federal Water Pollution Control Act, i.e., dependent upon voluntary cooperation from federal facilities to achieve necessary water pollution abatement. If the decision of the Ninth Circuit is reversed, and federal facilities are insulated from state permit requirements, the Federal Government, contrary to the wishes of Congress, will be effectively exempted from the national commitment to end water pollution.

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[10] Alabama v. Seeber, 502 F. 2d 1238, 1245 (5th Cir. 1974).

Respectfully submitted,

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No. 74-1435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

The Environmental Protection Agency, et. al.,
Petitioners

vs.

People of the State of California ex rel. State Water Resources Control Board and State of Washington, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR STATE OF WYOMING, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS.

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ARGUMENT:

The Ninth Circuit Court of Appeals correctly held that federal facilities must comply with the requirement of state permit programs under Section 313 of the Federal Water Pollution Control Act Amendments of 1972. 3

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II. Unless the term "requirement" includes state permit programs, the purposes and objectives of the Federal Water Pollution Control Act Amendments of 1972, will be defeated 5

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

No. 74-1435

Environmental Protection Agency, et al.,)
)
Petitioners,)
)
)
vs.)
)
)
People of the State of California ex rel.)
State Water Resources Control Board and)
State of Washington, et al.,)
)
Respondents.)

AMICUS CURIAE BRIEF OF THE STATE OF WYOMING IN SUPPORT OF RESPONDENTS.

QUESTION PRESENTED

Whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act of 1972. 33 U.S.C. §§ 1251-1376.

INTEREST OF THE STATE

The State of Wyoming, in addition to other goals in the Wyoming Environmental Quality Act, seeks:

> to preserve and exercise the primary responsibilities and rights of the State of Wyoming; to retain for the State control over its air, land and water and to secure cooperation between agencies of the State, agencies of other states, interstate agencies, and the federal government in carrying out these objectives. (§ 35-502.2, Wyoming Statutes, 1957, 1975 Cum. Supp.)

In furtherance of such goals, the State of Wyoming has entered into a "Memorandum Agreement" with the United States Environmental Protection Agency. This agreement transferred primary responsibility for the operation of the National Discharge Elimination System Permit Program (hereinafter "NPDES Program") to the State of Wyoming. The agreement took effect on January 30, 1975, upon prior program approval by the Administrator of the Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act. (33 U.S.C. 1342(b)). Paragraph 5 of the "Policies" section of the Memorandum Agreement provides:

> Region VIII of the Environmental Protection Agency, with technical assistance from [Water Quality] Division [of the Wyoming Department of Environmental Quality] shall have the responsibility for issuance of NPDES permits for point source discharges from Federal facilities to include point sources controlled by Indian Tribes or authorized by Indian Tribal organizations.

Execution of the Memorandum Agreement was a prerequisite for the State of Wyoming to assume primary responsibility for the NPDES program and thereby achieve the goals of the Wyoming Environmental Quality Act. However, the ability to assume full responsibility for the program and

to achieve the states' goals is impaired by Paragraph 5 of the Memorandum Agreement and the legal uncertainty of state authority over federal facilities under the Federal Water Pollution Control Act.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT FEDERAL FACILITIES ARE REQUIRED TO COMPLY WITH STATE PERMIT REQUIREMENTS FOR WATER POLLUTION CONTROL UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972.

The primary issue involves the meaning of Section 313 of the Federal Water Pollution Control Act of 1972 (the "Water Act"), 33 U.S.C. §§ 1251-1376, which provides that federal agencies "shall comply with Federal, **State**, interstate, and local **requirements** respecting control and abatement of pollution **to the same extent that any person is subject to such requirements**, including the payment of reasonable service charges." § 313 (33 U.S.C. § 1323) (emphasis added).

I. THE PLENARY POWERS CLAUSE, ARTICLE I, SECTION 8, CLAUSE 17, DOES NOT PROHIBIT THE IMPOSITION OF A FEDERAL REQUIREMENT THAT FEDERAL FACILITIES OBTAIN STATE PERMITS.

The Act itself provides no definitive meaning of the "requirements" with which federal agencies are directed to comply. Petitioner asserts here, as it did below, that the requirements to be complied with are a state's substantive effluent limitations and other standards, including schedules of compliance. (Petitioner's brief, p. 13). **Amicus** urges that the Ninth Circuit correctly interpreted the "requirements" of Section 313 to include compliance with state permit programs.

Petitioner argues that such a construction of Section

313 runs afoul of the Plenary Powers Clause, Art. I, § 8, cl. 17. **Amicus** contends that exclusive federal jurisdiction over federal enclaves has been waived by the Water Act; and that such waiver extends to state permit authority over federal enclaves as well as compliance with state substantive standards.

From one perspective, the question here does not present a case of state infringement on federal jurisdiction. In this context, the states cannot be seen as spontaneously intermeddling with federal activities. If the states are found to have been granted permit authority over federal facilities, the states would after all only be applying standards which by **federal** law must conform to **federal** minimums.

Petitioner's real objection appears to be the perceived unseemliness of federal facilities applying for a state permit. However, the state permit programs, in order to be approved, were carefully scrutinized by a federal agency and must conform to federal requirements. Section 402 (33 U.S.C. § 1342). In addition, there is still available an executive exemption, if it is felt that a federal facility's compliance with federally mandated standards is not appropriate. Section 313 (33 U.S.C. § 1323). In sum, the spectre raised by Petitioner, should states be allowed to exercise this permit authority, falls considerably short of state control over a federal facility.

However, since all agree that federal facilities must comply with state substantive standards, plainly the Water Act contains some sort of waiver of exclusive of federal jurisdiction. The objection of Petitioner goes to the scope of the waiver.

Petitioner states:

> Congress can affirmatively waive federal immunity from state regulation but in view of this traditional and constitutional division of powers between the federal government and the states, any such congressional waiver must be clear, unambiguous and **unequivocal**.

(Petitioner's brief p. 13) (emphasis added).

However, this Court has allowed such state regulation where the statutory language involved was less than clear.

In **Offut Housing Co. v. Sarpy County**, 351 U.S. 153 (1956), the Plenary Powers Clause was advanced as a bar to state taxation of a lessee of federal property. This Court permitted the state tax even though Justice Frankfurter observed that "This is one of those cases in which Congress has seen fit **not to express itself unequivocally**." 351 U.S. at 260 (emphasis added). By providing that federal facilities shall comply with state requirements "to the same extent that any person is subject to such requirements," the fact of waiver is clear. All that remains is the scope of this waiver.

As recently noted by this Court, "Congress has now permitted the states to extend important aspects of state powers over federal areas." **Evans v. Cornman**, 398 U.S. 419, 423 (1970). **Amicus** contends that congressional permission for the states to exercise permit authority over federal areas has been granted by the Federal Water Pollution Control Act.

II. UNLESS THE TERM "REQUIREMENTS" INCLUDES STATE PERMIT PROGRAMS, THE PURPOSES AND OBJECTIVES OF THE ACT WILL BE DEFEATED.

Petitioner concedes that federal facilities must comply with a state's substantive standards and limitations. Further, Petitioner states that federal facilities must conform to state schedules of compliance. In short, according to Petitioner, a federal facility must comply with virtually every state requirement except the permit procedure. However, without permit authority, the goals of the Act are frustrated and the states' position is untenable.

This Court has noted, in speaking of the federal-state relationship, that if federal policy is to be subject to state interests and regulation, "we can only believe that the objectives of the Act would have been differently stated." **Paul v.**

United States, 371 U.S. 245 260 (1965). However, one of the expressed goals of the Water Act is to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . ." Section 101(b) (33 U.S.C. § 1251 (b)). **Amicus** submits that without permit authority, the states cannot effectively assume their congressionally-imposed responsibilities under the Act.

Perhaps the most demonstrable difficulty with the role of the states as urged by Petitioner is the effectiveness of compliance schedules. A compliance schedule is not an analytically pure concept in the substantive-complaince/procedural-noncompliance dichotomy advanced by Petitioner. As defined by the Water Act, a compliance schedule is "a schedule of remedial measures leading to compliance with an effluent limitation, other limitation, prohibition, or standard." Section 502 (17) (33 U.S.C. §1362 (17)).

As witnessed by the regulations promulgated pursuant to the Water Act, compliance schedules are an integral part of the permit procedure and, indeed, are contained in the permits issued. Under a subpart labeled "Terms and Conditions of NPDES Permits" and in a section titled "Schedules of compliance **in issued NPDES permits**," (emphasis added) the regulations provide:

> . . . any State or interstate agency participating in the NPDES shall follow the following procedures in **setting schedules in NPDES permit conditions** to achieve compliance with applicable effluent standards and limitations, water quality standards, and other applicable requirements. . ." (emphasis added) 40 C.F.R. § 124.44. **See also**, 40 C.F.R. § 125.23.

Of necessity, compliance schedules are formulated ad hoc and need prepermit input for their determination. **See**, 40 C.F.R. § 125.11(b).

The analytical inconsistency of Petitioner's position is completely overshadowed by the impossibility of its implementation. How can a state compliance schedule be formulated, complied with, or enforced with regard to federal facilities if the state is not the permit authority? Absent the application of state permit programs to federal facilities, the conceded applicability of state compliance schedules to federal facilities becomes meaningless.

III. THE ENVIRONMENTAL PROTECTION AGENCY'S CONSTRUCTION OF SECTION 313 IS NOT ENTITLED TO ANY WEIGHT IN CONSTRUING SECTION 313.

E.P.A.'s regulations implementing the Water Act provide that state permit programs approved by the E.P.A. Administrator "do not cover agencies and instrumentalities of the Federal government. . . ." 40 C.F.R. § 125.2(b). The Petitioner argues that E.P.A.'s construction of the statute "should be followed unless there are compelling indications that it is wrong. . ." **Red Lion Broadcasting Co. v. Federal Communications Commission**, 395 U.S. 367, 381 (1968). Application of this salutory principle is inappropriate in the instant case since the administrative interpretation is not of longstanding duration, is inconsistent with the statutory mandate, and frustrates the express Congressional policy.

The rule of judical deference to administrative interpretations of a statute is not strictly applied where such interpretation is not of a continuous or longstanding nature. As stated by this Court in **Merrit v. Cameron**, "construction of a statute by a department charged with its execution [is not] to be held conclusive and binding upon the courts of the country, **unless such construction has been continuously in force for a long time**." 137 U.S. 542, 552 (1890) (emphasis added); Iselin v. United States, 270 U.S. 245 (1926); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 299 (1933); Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934). Where, as in the instant case, the administrative construction "was no sooner made than challenged," this Court has avoided applying the rule of

judical deference, since the administrative construction was very likely determined by the same considerations as are now put forward in its defense. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156 (1944). Similarly, reliance upon Executive Order 11752, as requiring the upholding of the administrative construction of Section 313, would allow administrative and executive considerations to determine the meaning of the statutory language. 38 F.R. 34793 (December 19, 1973), 3A C.F.R. 1973 Comp. 240. Executive Order 11752 should be given little weight since it was issued more than four months **after** the instant suit was filed, creating the inference that it was issued in response to the suit fo the purpose of lending credence to E.P.A.'s position.

Furthermore, the rule of judicial deference to an administrative construction is only a rule of interpretation, and neither is it an absolute rule nor does it preclude an inquiry by the courts as to the original correctness of such construction. Houghton v. Payne, 194 U.S. 88 (1904). While the interpretation given a statute by the administering agency is entitled to considerable weight, it is not conclusive and the courts are not bound by it. Harris v. Bell, 254 U.S. 103 (1920); United States v. Missouri P.R. Co., 278 U.S. 269 (1929); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968), **amended on other grounds**, 392 U.S. 901 (1968); Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973). As this Court has frequently said:

> But the courts are the final authorities on issues of statutory construction, F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385, 13 L.Ed. 2d 904, 914, 85 S.Ct. 1035, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' NLRB v. Brown, 380 U.S. 278, 291, 13 L.Ed. 2d 839, 85 Ct. 980. Volkswagenwerk Aktiengesellschaft v. F.M.C.,

> 390 U.S. 261, 272 (1968) (quoted in F.M.C. v. Seatrain Lines, 411 U.S. 726 (1973)).

The statutory mandate of the Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a) (33 U.S.C. § 1251(a)). Congress also clearly expressed its policy; of placing primary responsibility for achieving this objective upon the states.

> It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. § 101(b) (33 U.S.C. § 1251(b)).

E.P.A.'s administrative construction of Section 313 clearly detracts from the Congressional mandate by allowing federal facilities to avoid state supervision and control. One of the preceived deficiencies which the Water Act was designed to correct was the failure of the federal government to lead the way in eliminating water pollution. In this regard, the committee report accompanying S. 2770, contained a brief discussion of Section 313:

> This section would require every Federal agency with control over any activity or property to provide national leadership in the control of water pollution in such operations. . . .Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal Facilities meet all control requirements as if they were private citizens.
>
> Report of the Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Cong., 1st Sess. 67 (1971).

Petitioner relies upon the comments of the Administrative Conference of the United States in arguing that affirmance of the Court of Appeals in the instant case will create an administrative nightmare for federal facilities. The Conference's full statement, in fact, recognizes that a reversal of the lower court decision will "leave only the present fragmentary and ineffective federal procedures to ensure the compliance of federal facilities with environmental quality standards." 40 F.R. 27925, 27928 (July 2, 1975). Under the Conference's analysis, the present administrative construction of Section 313 enables federal facilities to continue the unresponsive course pursued by them prior to the Water Act.

The administrative construction of Section 313 is entitled to no weight since it is inconsistent with the statutory mandate to eliminate pollution and frustrates the congressional policy of placing the primary responsibility on the states to prevent, reduce and eliminate pollution.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, ... PETITIONERS,

VS:

PEOPLE OF THE STATE OF CALIFORNIA, EL REL STATE WATER RESOURCES CONTROL BOARD, and STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY, ... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF KENTUCKY, STATE OF GEORGIA, STATE OF HAWAII, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, ... PETITIONERS,

VS:

PEOPLE OF THE STATE OF CALIFORNIA, EL REL STATE WATER RESOURCES CONTROL BOARD, and STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY, ... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH, STATE OF GEORGIA, STATE OF HAWAII, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

MAY IT PLEASE THE COURT:

INTEREST OF THE AMICI CURIAE

The States represented in this Amici Brief have a common interest in the proper and effective implementation of their respective programs for the issuance of National Pollutant Discharge Elimination System permits

under the Federal Water Pollution Control Act Amendments of 1972. The States of Georgia, Ohio, and Hawaii have developed and submitted their programs to the Environmental Protection Agency and have been delegated authority to issue National Pollutant Discharge Elimination System permits subject to the same unreasonable and unauthorized exception which prompted the States of California and Washington to initiate this action.[1] The Commonwealth of Kentucky and the Commonwealth of Pennsylvania have not yet been delegated such permit issuing authority but anticipate that under current regulations of the Environmental Protection Agency any future approval of their programs would be made subject to the same limitation.

The water pollution control programs of each State

[1]The State of Ohio was granted authority to issue NPDES permits by a letter from the Regional Administrator, Region V, Environmental Protection Agency, dated March 11, 1974; the approval of the Ohio program was published in the Federal Register, Vol. 39, No. 137, page 26061, dated July 16, 1974. The State of Georgia was granted authority to issue NPDES permits by a letter from the Regional Administrator, Region IV, Environmental Protection Agency, dated June 28, 1974; the approval of the Georgia program was published in the Federal Register, Vol. 39, No. 137, page 26061, dated July 16, 1974. The State of Hawaii was granted authority to issue NPDES permits by a letter from the Regional Adminisrator, Region IX, Environmenal Protection Agency, dated November 28, 1974; the approval of the Hawaii program was published in the Federal Register, Vol. 39, No. 244, page 43759, dated December 18, 1974.

desiring to administer the National Pollutant Discharge Elimination System permit program for the navigable waters within their respective jurisdictions, including the amici States as well as respondents herein, must include at least the minimum standards and requirements specified in the Act. In developing these programs, the States have been, and are, required to meet all the criteria contained in Section 402 of the Act, 33 U.S.C. §1342, regulations promulgated by the Environmental Protection Agency pursuant to Section 304(h), 33 U.S.C. §1314(h), and Section 402, and the requirements of Section 303(e), 33 U.S.C. §1313(e), relating to the States' continuing planning process. In incorporating these measures into the State program and in carrying out and implementing these requirements to achieve the goals of the Act, the States must be able to control all point source discharges to navigable waters within their respective jurisdictions.

The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters;[2] primary responsibility for the achievement of this goal is vested in the States.[3] The means selected by the Congress for the attainment of this end is the regulation of all dischargers of pollutants through the opera-

[2]33 U.S.C. §1251(a); Section 101(a) of the Federal Water Pollution Control Act of 1972.

[3]33 U.S.C. §1251(b); Section 101(b) of the Federal Water Pollution Control Act of 1972.

tion of the National Pollutant Discharge Elimination System permitting process. In Section 402 of the Act, 33 U.S.C. §1342, the Congress provided for the administration of this system through the operation of State control programs. In specifying the requirements to be incorporated into these State programs and providing for continuous review, the Congress has assured that these programs will be formulated and operated in accordance with the Act. Absent control over all sources discharging into navigable waters subject to the State's jurisdiction, the Administrator could not approve the program and the State could not effectively formulate or enforce the standards authorized by Section 510 of the Act, 33 U.S.C. §1370, and made applicable to Federal facilities by Section 313 of the Act, 33 U.S.C. §1323. The unwarranted and unauthorized refusal of the Administrator to relinquish permitting authority over point sources operated by the Federal government poses a serious hindrance to the effective and efficient implementation of the National Pollutant Discharge Elimination System with respect to the waters involved and thwarts State efforts to meet their responsibilities under the Federal Water Pollution Control Act.

Amici herein support the respondents and the Court of Appeals For the Ninth Circuit in the position that the refusal of the Administrator to delegate to the States authority to issue National Pollutant Discharge Elimination System permits with respect to the facilities of the Federal government is beyond the powers, and in conflict with

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the duties, of the Administrator under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq.

SUMMARY OF ARGUMENTS

I. Section 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1342, establishes the National Pollutant Discharge Elimination System and contains the instructions of the Congress with respect to the administration and implementation of that system. Basic to the administration of the National Pollutant Discharge Elimination System is the right of the States to issue the NPDES permits required for discharges into the navigable waters subject to that State's jurisdiction. The Congress provided in Section 402(b) of the Act that the State could develop and submit for approval its program for the issuance of such permits and that if the Administrator found the program adequate he was to suspend his own issuance of permits with respect to such waters. The Administrator has disregarded this specific Congressional directive and has refused to relinquish permitting authority over facilities operated by the Federal government.

This refusal cannot be supported in the Federal Water Pollution Control Act and poses a serious hindrance to the effective implementation of State programs. These programs are designed to control all navigable waters within a State's jurisdiction and cannot be implemented without control over each source contributing to the pollution of such waters. Since NPDES permits are specifically required by the Act and such permits are to be issued by

the States, the requirements imposed under State programs are without doubt "requirements respecting control and abatement of pollution" within the meaning of Section 313 of the Act, 33 U.S.C. §1323. As such, they are requirements with which all Federal facilities must comply in accordance with the directives of the Congress.

II. The Supremacy Clause does not bar the State issuance of NPDES permits to facilities of the Federal government and is inapposite in this action for three reasons: (i) Federal facilities have been specifically subjected to the requirements of State regulatory programs in the area of water pollution control by Congressional waiver contained in Section 313 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1323; (ii) application of the Supremacy Clause in this action is contrary to the purposes of the clause since the requirements of State water pollution control programs do not in any way frustrate or pose an obstacle to the application of Federal law but rather were adopted in order to carry out the objectives of the Federal Water Pollution Control Act, as amended; (iii) in accordance with Section 402 of the Act, 33 U.S.C. §1342, the water pollution control programs of the respondents have been approved and such programs are operating under a direct, and authorized, delegation of Federal authority and are enforceable requirements of Federal law.

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ARGUMENT I

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY HAS EXCEEDED HIS AUTHORITY UNDER THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972 IN REFUSING TO SUSPEND HIS ISSUANCE OF NPDES PERMITS TO AGENCIES AND INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT DISCHARGING POLLUTANTS TO NAVIGABLE WATERS LOCATED WITHIN STATES WHOSE WATER POLLUTION CONTROL PROGRAMS HAVE BEEN APPROVED PURSUANT TO SECTION 402 OF THE ACT, 33 U.S.C. §1342, AND ARE APPLICABLE TO SUCH POINT SOURCES OF DISCHARGE PURSUANT TO SECTION 313 OF THE ACT, 33 U.S.C. §1323.

In the Federal Water Pollution Control Act Amendments of 1972, the Congress enacted a comprehensive, multi-faceted, and clearly discernible plan designed to restore and maintain the quality of the waters of the United States. This plan involves first, the improvement and development of new waste water treatment and control technology through the conduct of research and the construction of demonstration projects for various treatment methods.[4] The Act also directs the expenditure of huge amounts of money in construction grants for needed waste water treatment facilities throughout the Nation.[5] In order to assure that technological developments and advances were properly implemented and that construc-

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[4]Federal Water Pollution Control Act Amendments of 1972, Title I — Research and Related Programs, 33 U.S.C. 1251-1265.

[5]Id. Title II — Grants for construction of treatment works, 33 U.S.C. 1281-1292.

tion grants were used to finance only needed and properly designed facilities, the Congress also instituted the National Pollutant Discharge Elimination System and made unlawful any discharge of pollutants not in conformity with a permit issued in accordance with this system. *Federal Water Pollution Control Act Amendments of* 1972, *Title IV — Permits and Licenses,* 33 *U.S.C.* 1341-1345, *and Title III — Standards and Enforcement,* 33 *U.S.C.* 1311-1328.

It is the proper administration and implementation of this system in accordance with the directives of the Congress, and the failure of the Administrator of the Environmental Protection Agency to effectuate these directions, which are involved in this action. The Court of Appeals For the Ninth Circuit has correctly declared invalid the administrative regulation upon which the Administrator relied in refusing to relinquish permitting authority over point sources operated by the Federal government and has placed the administration of the National Pollutant Discharge Elimination System permit program with the respondents herein as directed in the Act and as intended by the Congress.

The National Pollutant Discharge Elimination System (hereinafter referred to as NPDES) was established in Section 402 of the Act, 33 U.S.C. §1342, and that Section contains the instructions of Congress with respect to the administration and implementation of the system. The approach of the permit system is similar to that employed in other regulatory statutes; an act is declared unlawful and then a procedure is established through which the prohibition may be modified and the activity controlled

and regulated. In the Federal Water Pollution Control Act, Section 301, 33 U.S.C. §1311, makes unlawful the discharge of any pollutant except in compliance with Sections 301, 302, 306, 307, 318, 402 and 404 of the Act. However, Section 402(k), 33 U.S.C. §1342(k), provides that compliance with a permit issued pursuant to Section 402 is to be deemed compliance with Section 301, Section 302, Section 306, and Section 307. The discharge of pollutants from point sources is, therefore, unlawful except as authorized in an NPDES permit. Under this system, all point sources are required to obtain such permits, including point sources operated by the Federal government. Indeed, Federal dischargers have been regularly applying for National Pollutant Discharge Elimination System permits and even under the Administrator's interpretation would be expected to continue such applications and renewals.[4]

Initial permitting authority under the National Pollutant Discharge Elimination System clearly rests with the Administrator pursuant to Section 402(a), 33 U.S.C. §1342(a). However, in keeping with the State's responsibility for the control of water pollution for all waters within their jurisdiction, Section 402(b), 33 U.S.C. §1342(b), provides for the development of State programs for the issuance of National Pollutant Discharge Elimination System permits. In pertinent part, Section 402(b) of the Act, 33 U.S.C. §1342(b), provides:

> ". . . [t]he Governor of each State desiring to administer its own permit program for discharges into

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[4]See: Petitioners' Brief, page 10.

navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact . . . . The Administrator *shall approve* each such submitted program unless he determines that adequate authority does not exist." (Emphasis Added).

This section continues by describing the elements which must, as a minimum, be incorporated into each State program. The Administrator's duty is clear; if each prescribed measure is not contained in the plan, he should not approve the program, however, if the plan does include all the requisite authority, he "shall approve" the program submitted.

The instructions of the Congress with respect to the administration of the National Pollutant Discharge Elimination System are further continued in Section 402(c), 33 U.S.C. §1342(c), of the Act, which reads, in pertinent part:

"(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator *shall suspend* the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under Section 304(h)(2) of this Act." (Emphasis Added).

Again, the Administrator's duties are clear and his actions are mandatory; unless he finds the State program deficient, he "shall suspend" his own issuance of permits

for those navigable waters subject to the State program.

The clear and explicit instructions of the Congress are not, however, reflected in the regulations promulgated by the Administrator. In regulations promulated in 40 C.F.R., Part 124, the Environmental Protection Agency set forth "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System."[7] These regulations are, in part, inconsistent with the Federal Water Pollution Control Act Amendments of 1972 in that they attempt to authorize a dual permitting system which is not contemplated in the Act and also that these regulations attempt to alter the jurisdictional base of the Act from navigable waters to point sources of discharge.

Section 402, 33 U.S.C. §1342, for instance, clearly limits the Administrator's alternatives to either approval or disapproval of a submitted State program. However, it is apparent from the provisions of 40 C.F.R. §124.10, and particularly the accompanying comment, that the Administrator does not acknowledge this constraint. 40 C.F.R. §124.10, and comment, read, in part, as follows:

"Prohibition of discharges into State waters:

Except as provided in §124.11, any State or interstate program participating in the NPDES must have a statute or regulation, enforceable in State courts, which prohibits discharges of pollutants by any person except as authorized pursuant to an NPDES permit.

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[7]Published at 37 Federal Register 28390, December 2, 1972; amended by 38 Federal Register 17999, July 5, 1973, and 38 Federal Register 19894, July 24, 1973.

(Comment: . . . Except as provided in §124.11, exceptions to the general prohibition cannot be approved. Depending on their scope and nature, any such exceptions will either (1) constitute grounds for withholding approval of the entire submitted program until such time as the State or interstate agency revises or modifies its program to conform to this subpart, *or* (2) constitute categories, types, or sizes of point sources for which the Administrator will not suspend the issuance of NPDES permits. In the latter case, the Administrator will issue NPDES permits for those point sources not subject to the State or interstate agency's authority.)" (Emphasis Added)

This regulation, if implemented in accordance with the accompanying comment, clearly does not implement or conform to the provisions of Section 402. The authority to make a partial delegation is not contained in the Act and the jurisdictional criteria stated in Section 402 is related to navigable waters, not to point sources. These errors are repeated throughout the regulations and the application of these erroneous constructions effectively precludes the efficient implementation of the State programs authorized in Section 402(b), 33 U.S.C. §1342(b).

The jurisdiction of the States under their approved NPDES permit issuing programs is coextensive with that of the Administrator insofar as the control of point sources discharging to the navigable waters covered by the program is concerned. Section 402(c), 33 U.S.C. §1342(c), makes it perfectly clear that upon approval of the State's program the authority of the Administrator under Section 402(a), 33 U.S.C. §1342(a), is suspended with respect

to the *navigable waters* covered by the State program. The requirement that each point source obtain an NPDES permit is in no way effected by the delegation to the State of authority to issue such permits, *the only change is the idenity of the governmental entity implementing the program.*

Moreover, efficient implementation of any more stringent standards contained in a State's plan, and authorized in Section 510 of the Act, 33 U.S.C. §1370, necessitates that the State have control over all discharges to navigable waters within its jurisdiction. What petitioner suggests and advocates is that Congress intended that there be a dual permitting system with two separate agencies administering two separate water pollution control programs and issuing NPDES permits to separate point sources discharging to the same navigable waters. Coordinating such permit issuing powers creates incredible administrative entanglements and makes it impossible for either agency to conduct a cohesive and effective program for any particular water. Such a program is certainly not consistent with the streamlining of administrative processes for the implementation of the Act called for in Section 101(f), 33 U.S.C. §1251(f):

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."

Rather than decrease the traffic of paperwork and interagency decision making, the position of petitioner can

only increase such burdens and the experience of California with this dual system demonstrates that the imposition of more stringent State "substantive" requirements is impaired where the State does not issue all the permits for its waters. As shown by the Affidavit of Bill B. Dendy, the operation of the dual system has resulted in the issuance of NPDES permits which failed to incorporate permit conditions relating to substantive control and discharge standards of the California program.[8]

Further, the development of applicable substantive standards is hindered under the system currently operated. Interpreting the case of *California* v. *Davidson,* 3 E.R.C. 1157 (N.D. Cal. 1971), the United States Court of Appeals For the Ninth Circuit found that the determination of substantive requirements applicable to any particular source could ordinarily be accomplished only through the administrative process.[9] The Control strategies and effluent limitations to be applied must be tailored to the individual source after considering the design of the facility, the quantity and timing of its discharge, the nature and concentration of its discharge, and the existing state of the water into which the discharge is made. For instance, Section 303, 33 U.S.C. §1313, authorizes, indeed requires, the States to identify waters where the application of the effluent standards contained in Section 301, 33 U.S.C. §1311, are not stringent enough to meet minimum water quality standards and requires the computation of maximum daily pollutant loads and the permits issued must reflect effluent limitations based on planned waste load allocations and frequently incorporating additional controls such as timing and rate of discharge. The allocation of maximum daily pollutant loads among the various dischargers on a particular stream or stream segment simply cannot be made or effectively planned without control over each point source. The necessity that such control rest with the States is amplified by the wide variety of programs authorized under Section 510, 33 U.S.C. §1370.

In addition to providing for more stringent standards than those imposed by the Administrator, Section 510 also authorizes the State programs to be broader and to examine different factors than those considered by the Administrator. The standards set forth in Section 402(b), Section 303(e)(3), and in the regulations of the Administrator are the minimal requisites of State plans and form a floor, not a ceiling, for the State program. This relation has been recognized in the regulations of the Environmental Protection Agency:

> 40 C.F.R. §124.21 "Application for NPDES permit.
>
> Procedures of any State or interstate agency participating in the NPDES shall insure that every applicant

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[8]Affidavit of Bill B. Dendy, Appendix, pp. 40-42, cites two such NPDES permits issued by the Administrator. In discussing this Affidavit in a footnote to **California v. EPA, 511 F.2d 963, 966**, the Court below observed:

> "[t]he Administrator is continuing to screen such state-requested permit conditions, and apply his own notions of 'best practicable' and 'best available' technology and of what constitutes compliance 'to the fullest extent possible' in issuing permits to federal agencies, rather than the standards suggested by the state.' "

[9]**California v. EPA, 511 F.2d 963, at 967 (9 CA, Feb. 13, 1975).**

for an NPDES permit complies with NPDES filing requirements. Such procedures and requirements shall include the following:

(a) Except as provided in paragraphs (b) and (c)(4) of this section and except as provided by the Administrator in regulations issued under the act, any person discharging or who proposes to discharge pollutants shall complete, sign, and submit an NPDES application short form in accordance with the instructions provided with such form.

COMMENT. Federal filing requirements for the NPDES include the timely filing of a properly completed Refuse Act or NPDES application form. State and interstate agencies may specify, where necessary, additional filing requirements such as the submission of engineering reports, plans, and specifications for present or proposed treatment or control of discharges of pollutants. While duplication should be avoided, the Administrator recognizes that the NPDES application form may not by itself satisfy the needs of every participating program."

The Administrator expressly recognizes in this regulation that this additional information may be necessary to carry out the State program even though not necessary to his own Section 402(a) permit issuing program. However, these additional requirements are no less a part of the National Pollutant Discharge Elimination System under Section 402(b). 33 U.S.C. §1342(b), than the requirements of the Administrator's program and as part of the approved programs for the issuance of the permits they are requirements with which all applicants, including

Federal dischargers, must comply. Recognition of State procedures applicable to all applicants for NPDES permits is also found in 40 C.F.R. §124.42:

> "Application of effluent standards and limitations, water quality standards, and other requirements.
>
> (a) Procedures for any State or interstate program participating in the NPDES must insure that the terms and conditions of each issued NPDES permit apply and insure compliance with all of the following, whenever applicable:
>
> . . .
>
> (4) Any more stringent limitation, including those (i) necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 510), or (ii) necessary to meet any other Federal law or regulation, or (iii) required to implement any applicable water quality standards; such limitations to include any legally applicable requirements necessary to implement total maximum daily loads established pursuant to section 303(d) and incorporated in the continuing planning process approved under section 303(e) of the Act and any regulations and guidelines issued pursuant thereto.

The only limitation imposed by the Congress on the operation of these State water pollution control programs is that they must be at all times administered in a manner consistent with the Act and impose standards at least as stringent as those in the Act and the regulations of the

Administrator. Section 402, 33 U.S.C. §1342, contains provisions designed to give just such assurances. Section 402(c)(2), Section 402 (c)(3), and Section 402 (d) provide that the Administrator is to carry out a continuing review of the State programs and of permits issued or proposed under these programs and gives him authority to withdraw his approval if the program is not administered in accordance with the Act. Again, the Administrator's alternatives are to approve or disapprove the program; nowhere is there any authority to retain his Section 402(a) authority to issue permits for any source discharging to a navigable water subject to an approved State program.

The applicability of the State program to all sources of pollutant discharge is mandated by Section 402,, 33 U.S.C. §1342, and guaranteed in Section 313, 33 U.S.C. §1323. In that section, the Congress has declared that facilities of all branches of the Federal government shall comply with all the "requirements respecting control and abatement of pollution" which are imposed on any other person discharging to the waters of any particular State or locality. In pertinent part, Section 313, 33 U.S.C. §1323, reads as follows:

> "Each department, agency, or instrumentality, of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that

> any person is subject to such requirements, including the payment of reasonable service charges."

From this section, it is clear that if a requirement is a "requirement respecting control and abatement of pollution" it is a requirement with which Federal facilities shall comply. Nowhere in this section is there any basis for a distinction between substantive and procedural requirements of State law. Indeed, Section 402, 33 U.S.C. §1342, demonstrates the Congress was concerned with the implementation of full and complete *programs* of water pollution control and was concerned that such programs be properly *administered*.

The position maintained by petitioner herein totally precludes the operation of such a program. Petitioner suggests that facilities of the Federal government need only comply with the substantive effluent standards and compliance schedules promulgated by the State, and need not apply for State operating permits. This position, however, ignores the manner by which such standards are formulated and applied. The control strategies and effluent limitations applicable to any particular source can only be determined by reference to the nature of the source, its size, and location, the quality of the water into which the discharge flows, and the type and nature of the control equipment and treatment facilities available for such facilities. Such determinations cannot be made absent an administrative examination of the source and its circumstances. It is through the operation of the control program, therefore, that the standards which petitioner claims must be met are formulated and applied. This is particularly true where more stringent standards, authorized

pursuant to Section 510, 33 U.S.C. §1370, are to be imposed or where the effluent limitations promulgated by the Administrator pursuant to Section 301, 33 U.S.C. §1311, are inadequate to produce acceptable water quality.

Petitioner's restrictive interpretation of the phrase "requirements respecting control and abatement of pollution" is further undermined by the language imposing an obligation to pay "reasonable service charges." Petitioner's contention that this language contemplates only charges for the use of public treatment works does not relate to other language in Section 313, 33 U.S.C. §1323, and deprives this phrase of any operative effect whatsoever. In discussing this language and petitioners' contention that it referred to charges for the use of public treatment works, the Ninth Circuit Court of Appeals reasoned:

> "Although a state's taxing power cannot operate within the confines of a federal enclave without the consent of the United States, no serious contention has ever been made that subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of municipal sewer system costs. On the other hand, any permit program charges might be sufficiently in the nature of a tax that specific federal consent would be required before they could be certified as 'properly payable' federal obligations." (Citations omitted). 511 F.2d 963, at 970 (9 CA, February 13, 1975).

This interpretation of the reasonable service charge language is in accord with the principle of statutory con-

struction that where possible all the language of a statute should be given operative effect and meaning. See: *Washington Market Co.* v. *Hoffman,* 101 U.S. 112 (1879); *Jarecki* v. *G. D. Searle & Co.* 367 U.S. 303 (1961); *Weinberger* v. *Hynson, Westcott & Denning, Inc.,* 412 U.S. 609 (1973). In addition to being violate of this principle, the interpretation advanced by petitioner appears totally unrelated to the rest of Section 313, 33 U.S.C. §1323. This section is concerned with requirements which must be met by the discharger. The reference of the section is to charges relating to the imposition of State and local requirements, not to the operation of publicly owned treatment works. Thus, even where Federal agencies discharge through a publicly owned treatment works the charges referred to in Section 313 are properly read as incident to the imposition of the State or local requirements rather than the actual treatment process employed.

In lieu of compliance with the provisions of a State's water pollution control program, the petitioner herein urges that enforcement of the standards of the Act, including any more stringent "substantive" state standards is to be secured solely through court action pursuant to Section 505, 33 U.S.C. §1365. This approach is not, however, adequate to perform the functions of the State program. It does not provide any guidance in the determination and formulation of what standards should be applied to a particular source and is totally inadequate to assure that stringent State standards are implemented and enforced. Under NPDES permits issued by the Administrator pursuant to his Section 402(a) powers, the facilities of the Federal government could be insulated from any enforcement of the State's standards. Pursuant to

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Section 402(k), 33 U.S.C. §1342(k), compliance with the terms and conditions of a permit issued pursuant to Section 402 is deemed compliance with the Act for purposes of Section 505, 33 U.S.C. §1365. If, therefore, the conditions imposed by the Administrator on such an NPDES permit did not reflect the imposition of the State standards, the discharger could, at least arguably, escape these State programs entirely. As shown by the Affidavit of Billy B. Dendy, (Appendix, pp. 40-42), discussed at page 14 of this Brief and in footnote 8 herein, there have been instances where the Administrator has, indeed, failed to incorporate State recommendations into NPDES permits issued to point sources discharging to the navigable waters of California. In these instances, the administration and enforcement of the Act falls exclusively upon the Courts without any recourse to administrative processes.

In addition to providing an inappropriate Section 402(k), 33 U.S.C. §1342(k), defense, the contentions of the petitioner deny any operative effect to Section 313, 33 U.S.C. §1323. By equating the obligations imposed in Section 313 with those specifically actionable under Section 505, 33 U.S.C. §1365, petitioner effectively renders Section 313 a redundant and unnecessary restatement of Section 505 except as to the ability of the President to exempt complaince. Moreover, petitioner argues, based on exemptive language contained in Section 401, 33 U.S.C. §1341, that even Section 505 has limited application as to Federal facilities. However, this exemption demonstrates only that where the Congress wished to relieve the Federal government of a compliance obligation it did so expressly and in specific languag. No such language appears in

Section 313, 33 U.S.C. §1323, nor is there any exemption from State programs adopted and approved under Section 402, 33 U.S.C. §1342. The absence of such express exemption is especially significant in light of the Section 505(f) reference to permit conditions and Section 313 requirements. The judicial enforcement of such conditions necessarily and inescapably implies the administrative imposition of such requirements.

Administrative imposition of permit conditions is precisely what the Congress contemplated in Section 402 of the Act and the provisions of the State programs for the issuance of permits are clearly "requirements respecting control and abatement of pollution" within the meaning of Section 313, 33 U.S.C. §1323. As stated by the Court of Appeals for the Ninth Circuit:

> "[i]t would appear that the reference to Section 313 to federal agency compliance with state 'requirements' was purposeful and artistic, and was meant to refer to these requirements which state administrative agencies might adopt under their express Section 402 authorizations."

511 F. 2d 963, at 972 (9 CA, February 13, 1975).

ARGUMENT II

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, DOES NOT BAR THE ISSUANCE OF NPDES PERMITS BY THE STATES TO AGENCIES AND INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972 AND DOES NOT PROVIDE A BASIS FOR THE ADMINISTRATOR'S FAILURE TO SUSPEND HIS ISSUANCE OF NPDES PERMITS FOR DISCHARGES INTO THE NAVIGABLE WATERS OF A STATE HAVING AN APPROVED WATER POLLUTION CONTROL PROGRAM.

There are at least three reasons why the Supremacy Clause does not operate to preclude the State issuance of National Pollutant Discharge Elimination System permits under the provisions of the Federal Water Pollution Control Act of 1972. First, Section 313 of the Federal Water Pollution Control Act, 33 U.S.C. §1323, expresses a clear Congressional waiver and specifically subjects Federal facilities to the requirements of State programs for the issuance of NPDES permits and other requirements respecting control and abatement of pollution. Second, application of the Supremacy Clause in this action is contrary to the policy supporting the rule since the issuance of NPDES permits by these States does not frustrate Federal law, the evil against which the Supremacy Clause protects. Third, the programs for the issuance of these Federal permits which were submitted by California and Washington have been approved by the Administrator of the Environmental Protection Agency and the Administrator is mandated to delegate his authority to issue such permits.

The power of the Congress to waive the immunity of the Federal government under the Supremacy Clause is clear. As was stated in *Mayo* v. *United States,* 319 U.S. 441, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1943):

> "It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."

In this case, Congress has enacted such a waiver. In enacting Section 313, 33 U.S.C. §1323, the Congress has declared clearly, explicitly, and most affirmatively, that Federal facilities "shall comply" with State water pollution control requirements:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or run-off of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested

> such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

It is difficult to imagine how Congress could have made a more affirmative declaration that the facilities of the Federal government were subject to the requirements of State pollution control programs than was made in this section. The uncompromising and unlimited language employed leaves no room for discretion; if the requirement is a "requirement respecting control and abatement of pollution", it is a requirement to which Federal facilities are subject. Certainly, the elements of a State program for the issuance of permits required under the Act are "requirements respecting control and abatement of pollution."

In the case of *Alabama* v. *Seeber*, 502 F. 2d 1238, 1243 (1974), the Court of Appeals For the Fifth Circuit construed substantially identical language from the Clean Air Act Amendments of 1970 and concluded:

> "The phrase 'shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements' effectively conveys a Congressional intent that federal facilities are to be treated equally

> with private facilities in the scheme of control established by the Act. Recognizing that in particular instances such treatment might prove inconsistent with the national interest, the section provides for executive exemption from any requirements.'

Similarly, the Court below herein ruled the language of the Section 313, 33 U.S.C. §1323, waiver was sufficiently clear and free from ambiguity and went on to state:

> "Section 313 also requires federal agencies to comply with state pollution control requirements 'to the same extent that any person is subject to such requirements.' Hence, the extent of the federal agency compliance duty can only be gauged from the type of program that section 402 of the Act demands that states institute for private dischargers." *California* v. *EPA*, 511 F. 2d 963, at 970 (9 CA, February 13, 1975).

Further, with respect to the nature and scope of the requirements imposed under Section 313, the Court of Appeals For the Ninth Circuit concluded:

> "[I]t would appear that the reference in Section 313 to federal agency compliance with state 'requirements,' was purposeful and artistic, and was meant to refer to those requirements which state administrative agencies might adopt under their express Section 402 authorizations.' *California* v. *EPA, supra*, at 972.

The ability of Congress to employ broad and uncompromising language in waiving Federal Supremacy and subjecting Federal facilities to State regulation was also established in *Baltimore National Bank* v. *State Tax Commission*, 297 U.S. 209 (1936). The issue presented in

that case was the power of a State to tax shares in a national bank which were held by an instrumentality of the Federal government. The Court held that the State did have such a power, and based its holdings on the fact that Congress had consented to this taxation by statute. The language of this statute indicated that "all" the shares of a national banking association whose principal place of business is within the limits of a State are subject to taxation at the discretion of that State's legislature. From this, the Court reasoned that shares held by an agency of the Federal government were taxable. In the instant case, the language of Section 313, 33 U.S.C. §1323, is even more explicit in indicating the consent of Conress to waive any insulation that a Federal facility might possess under the Supremacy Clause. Section 313 expressly provides that the Federal facilities are subject to local "requirements" in pollution matters. This is a clear and unequivocal waiver of any Federal primacy under the Supremacy Clause.

The application of the Supremacy Clause is also inappropriate in this case because the regulations which California and Washington seek to impose do not in any way act to frustrate or thwart the application of Federal law, but rather are in furtherance of and were adopted pursuant to Federal law. In the case of *Perez* v. *Campbell,* 402 U.S. 637 (1971), this Court quoted with approval the standard for determining whether a State statute was in conflict with the Supremacy Clause first enunicicated in *Hines* v. *Davidowitz,* 312 U.S. 52 (1941):

> "'In the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez* v. *Campbell, supra,* at 649.

See also: *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 224 (1964); *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967).

Applying the *Hines* test to the instant case, there is no question that these requirements do not conflict with Federal law since it is through the application of the State programs for the issuance of National Pollutant Discharge Elimination System permits that the objectives and goals of the Federal Water Pollution Control Act are to be obtained. In fact, it was at the specific direction of Congress that these plans were formulated and adopted. Under these circumstances, the Supremacy Clause is clearly not a bar to this action to secure compliance with the programs of California and Washington for the issuance of National Pollutant Discharge Elimination System permits.

Finally, the Supremacy Clause is inapposite in this case because the States have been delegated authority to administer the requirements of the Federal Act. The water pollution control programs of the States have not been adopted *sua sponte* in the provincial exercise of police powers, but rather in direct response to Federal requirements and in order to qualify for the delegation of Federal authority to administer a Federal Act. Such a delegation of Federal authority in the administration of a Federal Act was upheld in *Stewart Machine Co.* v. *Davis,* 301 U.S. 548 (1937). In that case, the States had been delegated au-

thority to administer the provisions of a Federal program of unemployment insurance established under the Social Security Act of 1935, 42 U.S.C. §501-503. Similarly, the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq., directs that authority to issue NPDES permits is to be delegated to the States, providing the program operated by the States meets all listed requisites. The Administrator has found that the programs operated by the respondents herein do meet the requirements of Section 402 of the Act, 33 U.S.C. §1342, and yet has refused to suspend his own authority as directed in Section 402(c), 33 U.S.C. §1342(c). There can be no violation of the Supremacy Clause where, as here, Congress has explicitly authorized State regulation of Federal installations under a Federal Act. Despite the fact that the control programs are embodied in State law, the permits issued through the operation of these programs are Federal permits within the National Pollutant Discharge Elimination System and are enforceable by the Administrator and the Federal Courts as Federal requirements.

CONCLUSION

The failure of the Administrator to relinquish permitting authority over the Federal agencies and installations discharging pollutants to navigable waters covered by a State water pollution control program which has been approved pursuant to Section 402(b) of the Act, 33 U.S.C. §1342(b), deprives that State of its primary rights and responsibilities to prevent and reduce water pollution and to plan the development and use of land and water resources within its jurisdiction. The Administrator's act is contrary to both the explicit language of the Act and the policies which underlie it. Section 402(c), of the Act, 33 U.S.C. §1342(c), requires and mandates the Administrator to suspend his issuance of permits where there is an applicable State program approved under Section 402(b). The provisions of these programs for the issuance of NPDES permits are certainly "requirements respecting control and abatement of pollution" within the meaning of Section 313 of the Act, 33 U.S.C. §1323. Section 313, therefore, obligates the agencies of the Federal government to comply with the requirements of these programs just as if they were private citizens, and to the same extent. Operation of a successful program to clean up the waters of any State requires that the administering body have control over every point source discharge into those waters. It was the intent of the Congress that the States and not the Administrator were to be primarily responsible for achieving this goal. The Administrator's action thwarts the well and carefully conceived plan of the Congress and poses an obstacle and hindrance to the effective and efficient implementation of the Federal Water Pollution Control Act of 1972.

For these and the foregoing reasons, the Judgment of the United States Court of Appeals For the Ninth Circuit should be affirmed.

Dated: SEPTEMBER 30, 1975.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein BRIEF OF THE COMMONWEALTH OF KENTUCKY, STATE OF GEORGIA, STATE OF HAWAII, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS was served by mailing three copies hereof, via United States Mail, air mail, postage prepaid, to: Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable A. Raymond Randolph, Jr., Deputy Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Edmund B. Clark, Attorney, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Raymond N. Zagone, Attorney, Department of Justice, Washington, D.C., 20530; Honorable Raymond W. Mushal, Attorney, Department of Justice, Washington, D.C., 20530; Honorable Robert V. Zener, General Counsel, Environmental Protection Agency, Fourth and M Streets, S. W., Washington, D.C., 20460; Honorable Evelle J. Younger, Attorney General, State of California, Honorable Roderick Walston, Deputy Attorney General, State of California, Honorable Richard C. Jacobs, Deputy Attorney General, State of California, and Honorable Carl Boronkay, Assistant Attorney General, State of California, 6000 State Building, San Francisco, California, 94101; Honorable V. Frank Mendicino, Attorney General, State

of Wyoming, 210 State Capitol, Cheyenne, Wyoming, 82001, and Honorable Maryland S. Kite, Special Assistant Attorney General, State of Wyoming, Attorney General Office, 210 State Capitol, Cheyenne, Wyoming, 82001; Honorable Bronson C. LaFollette, Attorney General, State of Wisconsin, Department of Justice, State Capitol, Madison, Wisconsin, 53702; Honorable John J. Hill, Attorney General. State of Texas, Supreme Court Building, Austin, Texas, 78711; and Circuit Judge Eugene A. Wright, Circuit Judge Herbert Y. C. Choy, and Judge Burns, United States Court of Appeals For the Ninth Circuit, San Francisco, California, 94101, and further the undersigned hereby certifies that all parties required to be served in this action have been served, all this the 30 day of September, 1975.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STATES OF NEW YORK, FLORIDA, AND MINNESOTA AS *AMICI CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STATES OF NEW YORK, FLORIDA, AND MINNESOTA AS *AMICI CURIAE*

Interest of Amicus

New York, as other states, has cooperated with the federal government in its efforts to abate water pollution. Pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (the "Act" or "FWPCAA"), New York State enacted legislation designed to allow it to administer its own discharge permit system. New York Environmental Conservation Law,

Article 17, Titles 7 and 8. New York law specifically refers to the federal law in defining its purpose (E.C.L. § 17-0801) and its terms (E.C.L. § 17-0807).

The 1972 Amendments prohibit the discharge of pollutants into the navigable waters of the United States as defined in the statute, 33 U.S.C. § 1311(a), unless a permit is obtained from the U.S. Environmental Protection Agency ("EPA"), 33 U.S.C. § 1342(a). However, the Amendments allow the delegation of permit system powers to any State whose laws and regulations comply with the requirements of federal law. 33 U.S.C. § 1342(b). New York believes it will soon take over the responsibility of administering the pollutant elimination system within its borders.

New York considers it essential that it have full control over the quality of water within its boundaries when it takes over such responsibility under the Act. Only then can it exercise its constitutionally protected police powers to protect the health and welfare of its citizens. The Administrator of the U.S. Environmental Protection Agency proposes that the State permit program exclude all federal sources of pollutant discharges and that they be subject to no permit program. 40 C.F.R. 125.2(b). The New York law which sets up a State Pollutant Discharge Elimination System, E.C.L. Article 17, Titles 7 and 8, makes no distinctions between types of polluters; all are required to obtain permits. If federal facilities were held to be exempt from State permits, the State could not assure water quality standard maintenance in any stream which a federal facility was polluting. Located within New York State are Army, Navy, Coast Guard and Air Force installations, including West Point, Governor's Island and Griffiss Air Force Base, as well as numerous other federal facilities. Similarly, the States of Florida and Minnesota have many federal pollution-causing installations. Control of discharges from these sources is essential to clean water in New York and other states.

New York has already filed a brief with this Court as *amicus curiae* in a case which presents the same question with reference to the federal Clean Air Act, 42 U.S.C. § 1857f. *Kentucky ex rel. Hancock* v. *Train*, No. 74-220.

Summary of Argument

I. The Court of Appeals correctly held that federal facilities which are sources of water pollution must comply with state permit procedures established pursuant to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. The Act was passed by Congress to rid the nation of a major national disgrace, the systematic pollution of our waters by both public and private dischargers. It established a comprehensive program of federal and state cooperation in the cleanup effort. Petitioners' argument that federal facilities which are sources of pollutant discharges are exempt from state pollutant discharge elimination permit requirements is contrary to the clear wording of the Act.

Federal policy on water pollution abatement has consistently recognized the States' "primary responsibilities" in this area, and that policy is continued in the present Act. 33 U.S.C. § 1251(b). The FWPCAA requires all dischargers of pollutants to obtain a permit delineating the amount of pollutants they may discharge. 33 U.S.C. § 1342 (a). The Administrator of EPA must delegate his authority to issue permits to any state that has a permit program which meets the Act's requirements. 33 U.S.C. § 1342(c)(1).

Petitioners claim that federal facilities are free to ignore state administrative procedures for water quality control, but admit that they must meet state-applied substantive effluent limitations. But the clear language of 33 U.S.C. § 1323 requires that federal water polluters comply with state "requirements respecting control and abatement of

pollution to the same extent that any person is subject to such requirements, including reasonable service charges." The term "requirements" is used throughout the Act as a generic term and must be given its ordinary, broad meaning. It clearly does not mean just "effluent limitations," as petitioners argue.

In two sections of the Act (§ 1316 and § 1318) Congress specifically prohibited the Administrator from delegating certain of his powers over federal facilities. If Congress had chosen to exempt federal facilities from state permits, it would have done so in a similar manner.

In practice, it is virtually impossible for states to set substantive effluent limitations on federal polluters without the administrative procedures used in the permit process. Exempting federal facilities from state permits effectively exempts them from any effluent limitations.

The language of 33 U.S.C. § 1323 which requires federal facilities to pay "reasonable service charges" is further evidence that Congress intended them to be subject to state permit programs. The term "service charges" refers to permit charges as well as sewer hook-up charges.

Once a state permit program is certified by the Administrator, he can no longer issue permits in that state. 33 U.S.C. § 1342(c)(1). If federal facilities were exempt from state permits as well, they would be unregulated. Even if the Administrator were to attempt to continue to issue permits to federal facilities in a certified state, the states would be precluded from setting more stringent limitations than those required by the Act for federal facilities. This would violate 33 U.S.C. § 1320, which specifically says that states are not preempted from setting more stringent standards.

II. Petitioners argue that subjecting federal facilities to state permit procedures would violate the Supremacy Clause and the Plenary Powers Clause of the Constitution. On the contrary, the thrust of the Act as a whole is to

expand federal authority into areas which were formerly the domain of the states. States are preempted from issuing discharge permits with less stringent requirements than those of the Act. 33 U.S.C. § 1370. Delegation of permit authority from the Administrator can only be made if a state has an approvable program to control water pollution. 33 U.S.C. § 1342. Even after certification of a state permit program, much of the standard-setting authority remains with the Administrator. Congress, recognizing this, gave the states the primary responsibility for enforcement of the Act, including the enforcement against federal enclaves.

Congress fully protected federal facilities from the imposition of any unreasonable state requirements. Section 1323 allows the President to exempt any facilities from the requirements of the Act "if he determines it to be in the paramount interest of the United States to do so."

Congress has specifically authorized state regulation of federal facilities in 33 U.S.C. § 1323, meeting the test described in *Mayo* v. *United States*, 319 U.S. 441, 448, that Congress "affirmatively declare" a federal instrumentality subject to state regulation. Since violation of a state permit program is a violation of federal as well as state law, the Supremacy Clause does not absolve federal facilities from compliance.

POINT I

The Federal Water Pollution Control Act does not exempt federal sources of pollutant discharges from compliance with federally-approved state permit procedures for control and abatement of water pollution.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1251 et seq., culminating years of endeavor in designing environmental legislation to meet the awesome problems of contamination of our nation's waterways. The Act established a system

of federal-state cooperation with the goal of elimination of pollutant discharges into the waters of the United States by 1985. 33 U.S.C. § 1215(a)(1).

Petitioners here maintain that despite the clear mandate of the FWPCAA, federal facilities need not comply with state permit procedures for the discharge of pollutants into state waters, even though those same facilities concededly must meet state-applied effluent discharge limitations. The fallacy of this argument is evident not only on its face but from examination of the Act as a whole.

Federal efforts towards controlling water pollution date back to the 1899 Rivers and Harbors Act, 30 Stat. 1151, 1152, 33 U.S.C. §§ 401 et seq., which originally was applied to obstructions to navigation and was later applied to discharge of pollutants. *United States* v. *Republic Steel Co.*, 362 U.S. 482. In 1948, the Water Pollution Control Act, 62 Stat. 1155 (formerly 33 U.S.C. §§ 1151 et seq.) was enacted, declaring (§ 1)

> "the policy of Congress to recognize, preserve and protect the primary responsibility of the states in controlling water pollution."

This policy has been preserved through successive amendments of the 1948 Act into its present form. See 33 U.S.C. § 1251(b). While it has been the trend of federal legislation to progressively involve the federal government more deeply in pollution control, in the 1972 Amendments Congress continued to rely upon the states as the primary agents in the fight to clean our waters.

The Act sets up a National Pollutant Discharge Elimination System ("NPDES") which requires every "person"[1]

[1] The term "person" is defined in 33 U.S.C. § 1362(5) to mean "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a State, or any interstate body." In 33 U.S.C. § 1323 each federal facility is required to comply with "Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . ."

who discharges pollutants into any navigable body of water to obtain a permit. 33 U.S.C. §§ 1311, 1342(a)(1). The NPDES permit must contain effluent limitations[2] required by § 1311 for point sources,[3] which will allow the attainment or maintenance of applicable water quality standards by July 1, 1977. 33 U.S.C. § 1312. In most cases, water quality standards will be those already set by states (33 U.S.C. § 1313), so long as they conform to the requirements of the Act of "protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities in and on the water. . . ." 33 U.S.C. § 1312(a).

The Administrator is required to delegate his powers to issue permits to any state that has adequate authority to conduct its own permit system, 33 U.S.C. § 1342(b), and that has approved water quality standards. 33 U.S.C. § 1313. Thus, both "ambient" water quality and point source standards will ultimately be under state control.

The sole question before this Court involves the division of authority under the Act between the states and federal government with respect to federal facilities. Petitioners here claim that even after permit program (NPDES) powers of the Administrator have been delegated to the states, federal facilities need not comply with what they term "administrative" state permit procedures. Petitioners at the same time admit that federal facilities must comply with state applied point source effluent limitations.[4]

[2] An "effluent limitation" is a restriction in the discharge of pollutants from a point source. 33 U.S.C. § 1362(1).

[3] A "point source" is any "discernible, confined and discrete" source from which pollutants may be discharged. 33 U.S.C. § 1362(4).

[4] 40 C.F.R. 125.2 (b), a regulation of the Administrator pursuant to the FWPCAA, imposes this interpretation of the Act on states seeking approval of their permit programs.

Central to this question is 33 U.S.C. § 1323, which states:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. • • •"

Congress has here declared, in as clear language as possible, that federal facilities are not above the law, and that they must comply "with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." This court should give this statute enacted for the protection of the public health a generous construction consistent with its plain and clearly-expressed meaning. *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232; *Tcherepnin* v. *Knight*, 389 U.S. 332, 336.

Congress specifically expressed dismay at the failure of the Federal government to lead the effort in pollution

abatement. Accordingly, Federal compliance with the new Act was strongly spelled out.

> "Evidence received in hearings [on the FWPCAA] disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. *This section requires that Federal facilities meet all control requirements as if they were private citizens.*" Senate Report No. 92-414, p. 66 (emphasis added)

Beyond the clear language of § 1323, petitioners' interpretation of the Act does not comport with its terms or overall design. They argue that the term "requirements" refers only to effluent limitations and not to administrative procedures such as state permits. This procedure-substance dichotomy which petitioners seek to employ has been denounced as a "semantical red herring" in reference to the almost identical language in the Clean Air Act. 42 U.S.C. § 1847f. *Alabama* v. *Seeber*, 502 F. 2d 1238, 1245 (1974), cert. pending No. 74-851. The term "requirements" is used throughout the Act to refer to both effluent limitations and administrative procedures. It is clearly not a term of art—nowhere is it defined in the Act. Rather, it is a generic term, to be given its ordinary meaning. If Congress had wanted to restrict its meaning, it would have referred to "effluent limitations."[5] In § 1342(b), the section dealing with state permit systems, "requirements" is used in reference to §§ 1311 and 1312 which deal with effluent limitations [33 U.S.C. § 1342(b)(1)(A)]; and also in reference to § 1318 of the statute, which deals with inspection, monitoring and entry [33 U.S.C. § 1342(b)(2)]. In

[5] Defined in 33 U.S.C. § 1362(11).

§ 1314(h), "requirements" is used to describe forms for the gathering of "information from owners and operators of point sources of discharge" subject to state permit procedures. In light of the generalized usage of the term throughout the Act, petitioners' assertion that "requirements" in § 1323 means only "effluent limitations" is illogical and totally unwarranted by any language of the Act or its intent.

In several sections of the Act, Congress expressly prohibited the Administrator from delegating his authority to regulate federal facilities. In § 1316, new federal facilities are exempted from state-applied new source standards of performance, and in § 1318 all federal facilities are exempted from state inspection, monitoring and entry requirements. Petitioners point out these specific exceptions in support of their argument, maintaining that states are barred from devising acceptable permit programs for federal facilities under § 1342(b) (Pet. Brief pp. 27-28). Quite to the contrary, the doctrine of *expressio unius est exclusio alterius* applies. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22. These exceptions show that Congress specifically exempted federal facilities where it sought to do so, and it therefore must be taken that if Congress had also desired to exempt them from state permit procedures, it would have done so. See *Alabama* v. *Seeber, supra,* 502 F. 2d at 1244. And merely because states are precluded from the right to inspect, monitor or enter federal point sources, it does not follow that states may not subject them to their permit procedures. Such a suggestion would run counter to the very purpose of a pollutant discharge elimination system.

The employment of a permit system drastically eases the administrative burden upon a regulatory agency. All dischargers of pollutants are thereby required to come forward with data showing what their effluents contain and how much, what their processes are, and what technology is available to reduce or eliminate effluents. From all this

data, as well as water quality standards, the permit agency can decide what effluent limitations shall apply to a particular point source. Without such an obligation on polluters, it would be virtually impossible to apply effluent limitations. What petitioners in essence are arguing, sub silentio, is for federal sources to be exempt from effluent limitations as well. All the specific exemptions of §§ 1316 and 1318 mean is that once a state sets effluent limitations for a federal source, only the federal EPA can enter to inspect and monitor the facility. Significantly, federal facilities are not exempted from the requirements of § 1318 to report their discharges, maintain records of them which are correlated to effluent limitations (applied by states) and to make these reports public. 33 U.S.C. § 1318(a)(A) and § 1318(b). Thus state or public enforcement against federal facilities was not intended by Congress to be precluded.

The language of § 1323 also subjects federal facilities to state or local "service charges." Petitioners here offer a narrow reading of this term, to mean sewer system user charges. However, as the court below found in rejecting this contention, sewer charges may presently be levied by a local government on a federal facility. 511 F. 2d 969, 970. Also, assuming for argument that "requirements" in § 1323 only meant effluent limitations, the phrase "including reasonable service charges" would be a *non sequitur. Id.* There are no charges for effluent limitations. Since the cost of processing a permit application is quite high, Congress most likely intended for states to be reimbursed for such costs by federal facilities in permit application charges. The term "service charges" is nowhere else used in the statute and it should be given its broad, generic meaning, consistent with the clearly-expressed need to purify the Nation's waterways, so as to include both sewer charges and permit charges.

Denying states the power to issue permits to federal facilities would leave them totally unregulated, an event

clearly obnoxious to the intent of Congress. Section 1342 (c)(1) of the statute provides that within ninety days after a state submits an approvable permit system program to the Administrator, "he *shall* suspend the issuance of permits under subsection (a) of this section (NPDES permits) . . . ." 33 U.S.C. § 1342(c)(1). In other words, the Administrator could no longer issue permits within the boundaries of the state. Accordingly, if the states were unable to issue a permit to federal facilities, no effluent limitations whatever could be imposed upon their discharges. Even petitioners concede (Pet. Brief p. 18) that such an eventuality would be inconsistent with the Act.

Petitioners' argument assumes that somehow the states would apply effluent limitations to federal facilities and those would be made effective by NPDES permits issued by the Administrator. We have already shown why this hypothetical process is not practicable; legally it would be impossible. Under § 1370 of the Act, states may enforce "(A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control and abatement of pollution" so long as it is at least as stringent as those required by this Act. Thus a state may choose to enforce more stringent requirements on polluters than the Administrator would require, but without permit authority, would be unable to effectuate those stricter standards against federal facilities. As the court below indicated,

> "some federal agencies may in fact be refusing in certain instances to comply with water quality standards established by state administrative boards." App. A, pp. 7a-8a, see n. 2.
>
> ". . . [T]he practical effect of reading Section 313 (§ 1323) so as to compel only 'substantive' federal agency compliance would be to render state permit programs ineffectual as to those dischargers, both substantively and procedurally." App. A, pp. 26a-27a.

The Court of Appeals' determination below draws much support from the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857, which were the precursor, in design, of the FWPCAA. The Clean Air Act contains a section exactly analogous to the provision now in question in the Water Act [Compare 33 U.S.C. § 1323 (Water Act), and 42 U.S.C. § 1857f (Air Act)], which is also before this Court for final determination of its meaning. *Kentucky ex rel. Hancock* v. *Train,* No. 74-220. Both Acts create a federal system for the control of pollution and place the heavy burden of enforcement mainly upon the states. While the Acts have some significant differences, a reading of one will assist the Court in interpreting the other. See Brief of the Attorney General of the State of New York as *Amicus Curiae* in No. 74-220.

POINT II

Compliance by federal instrumentalities which are sources of water pollution with federally-approved state discharge permit requirements does not violate the Supremacy Clause or the Plenary Powers Clause of the Constitution.

The petitioners in their brief recite in sober terms the supposed violence which would be done to our federal system of government if states were allowed permit authority over the discharge of pollutants from federal enclaves. They cite the Supremacy Clause (Art. VI, cl. 2) and the Plenary Powers Clause (Art. I, § 8, cl. 17) and numerous court decisions as evidence of the long tradition of federal immunity from state control.

In fact, the gloss of state intrusion into the federal prerogative which petitioners urge is no more than an illusion. Actually, the Act is an example of "new federalist" legislation, which extends federal authority into areas traditionally of state concern. While the Act's preamble

states that water pollution is primarily a state concern, 33 U.S.C. § 1251(b), the thrust of the Act is to create a Federal system for controlling water pollution until a state permit program, devised according to the Act, is approved by the Administrator of EPA. 33 U.S.C. § 1342. Even under an approved state program, the quality of waters within a state must meet federally-approved standards, 33 U.S.C. § 1313(a)(2), and point sources are required to utilize federally-specified control technology. 33 U.S.C. § 1314(b). States are preempted from setting less stringent standards than those required by the Act. 33 U.S.C. § 1370.

The legislative history of the Amendments makes clear that many Congressmen were sensitive to the extension of the federal domain to areas formerly regulated by the states. See the remarks of Reps. Blatnik (pp. 335-356), Jones (pp. 358-359) and Kluczynski (p. 363) in "A Legislative History of the Water Pollution Control Act Amendments of 1972," Vol. 1, 1973, Serial No. 93-1. The states were given the major administrative burden under the Act because Congress recognized the importance of state and local involvement to the achievement of the Act's goals. States were given the primary responsibility for enforcement of the Act, including enforcement against federal enclaves. See *Brown* v. *Environmental Protection Administration, et al.*, —— F. 2d ——, 8 E.R.C. 1053 (9th Cir. 1975), concluding that the Clean Air Act Amendments of 1970, the precursor in form to the FWPCA Amendments, would violate 10th Amendment principles if interpreted to impose sanctions upon a non-complying state. The provision interpreted, 42 U.S.C. § 1857c-8(a)(2), in the Clean Air Act is the analogue of 33 U.S.C. § 1319(a)(2) in the FWPCAA.

Nor can the spectre of unreasonable state permit requirements forcing the closing of a federal facility be realistically raised here. Section 1323 of the FWPCAA specifically allows the President to exempt any federal effluent

source from compliance with state requirements "if he determines it to be in the paramount interest of the United States to do so." This provision is intended to be used in extraordinary circumstances, however, and the President may only exempt a source for one year at a time. Certainly most federal sources will be required to comply, as they should be. Their efforts to meet state-determined effluent limitations will surely be more burdensome than compliance with state administrative regulations. Thus the argument of state-imposed burdens on federal facilities which violate the Supremacy Clause is of no merit.

Moreover, any state permit procedures which will apply to federal facilities are authorized by Congress and are, in effect, federal law. As the court below stated,

> "It is of course well established that Congress may waive exclusive jurisdiction over the activities of Federal enclaves in deference to State regulation of those activities, at least so long as in doing so it does not undermine its ultimate legislative control over these areas." (Citations omitted.) App. A, p. 10a.

In *Mayo* v. *United States*, 319 U.S. 441, 446, this Court held that "[i]t lies within the Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities." Under the FWPCA Amendments, the states act as agents of the federal government and are explicitly given the authority to regulate federal facilities. Section 1323 provides that federal agencies must comply with state "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." This provision fully satisfies the test in *Mayo, supra*, 319 U.S. at 448, that Congress "affirmatively declare" federal instrumentalities subject to state regulations. See decision below, App. A, p. 10a.

Finally, the refusal of federal instrumentalities to comply with a state permit program is a federal offense. The

Administrator, upon approving a state permit program, delegates all of his permit-granting authority within that state and part of his enforcement powers. He retains concurrent jurisdiction to enforce any standards contained in state permits. 33 U.S.C. § 1319(3). If the violations of state permits were not violations of federal law as well as state law, the Administrator would have no authority to enforce them. (See *Getty Oil* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017 (D.C. Del. 1972), mod. on other grounds 467 F. 2d 349, cert. denied 409 U.S. 1125, which held violations of state Clean Air Act plans are federal offenses enforceable by the Administrator).

The FWPCA Amendments provide that a citizen may sue to enforce "an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a)(1). These "effluent standard[s] or limitation[s]" are to be determined by a state after its program is certified. Yet even then, jurisdiction of such actions is conferred upon the federal district courts and is considered a federal question. The refusal of a federal facility to comply with state permit regulations would violate federal law, and the Supremacy Clause would not absolve it from compliance.

Unless the judgment of the Court of Appeals is affirmed, the states will be paralyzed from protecting the purity of their waterways from discharges by federal instrumentalities. This would create a double standard which Congress never envisaged, under which the same acts of non-compliance which could result in fines and penalties for a private polluter or a state or municipal agency would be, under legislation enacted by Congress, immune from permit regulation if caused by federal agencies. That double standard would severely hamper enforcement of water-quality legislation and discourage others from compliance. Nothing in the Act or the Constitution compels such an anomalous result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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